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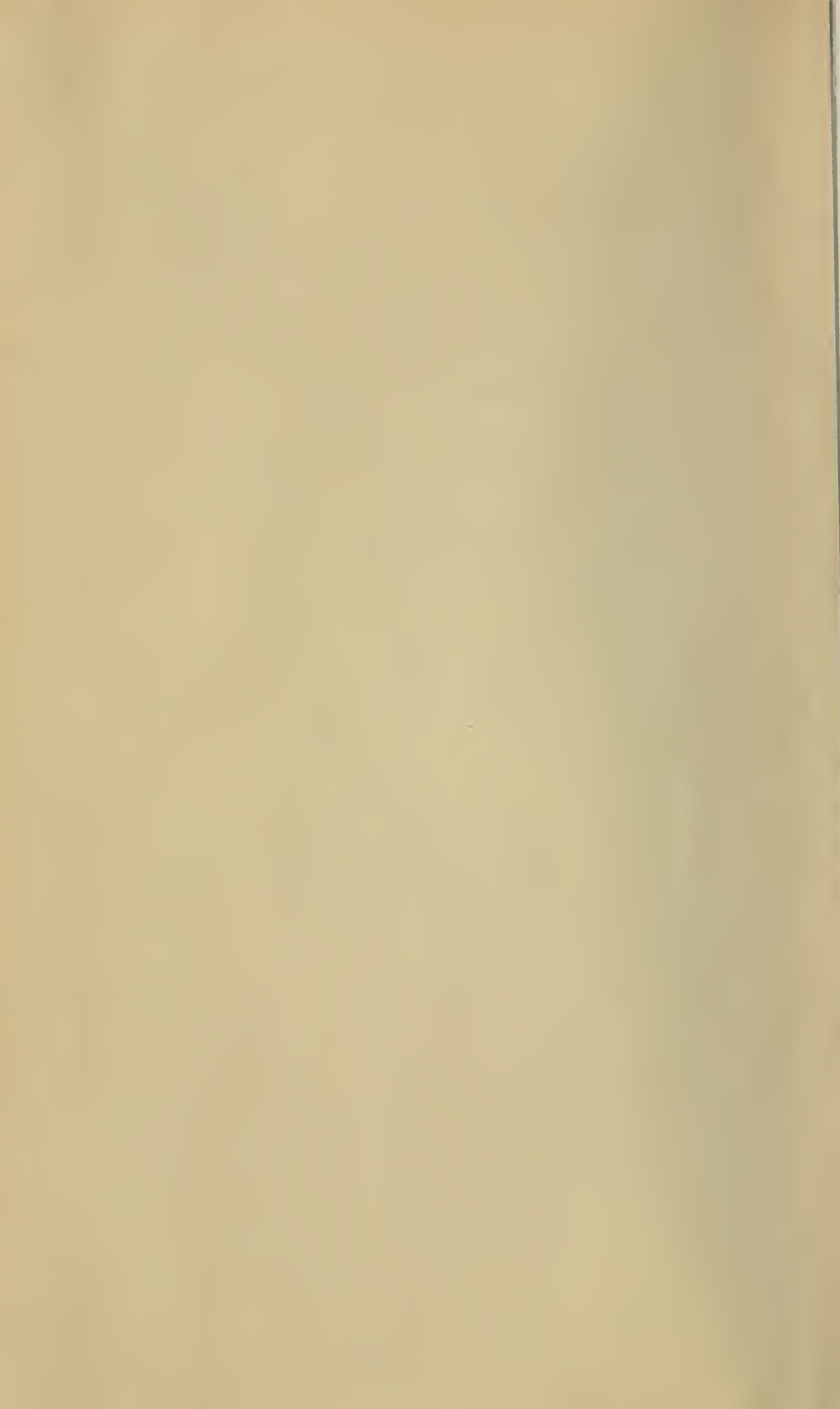


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A TREATISE
ON
THE LAW OF RIPARIAN RIGHTS
AS THE SAME IS FORMULATED AND APPLIED IN THE PACIFIC
STATES, INCLUDING THE DOCTRINE OF
APPROPRIATION

By JOHN NORTON POMEROY, LL.D.
AUTHOR OF WORKS ON CONSTITUTIONAL AND INTERNATIONAL LAW
AND ON EQUITY JURISPRUDENCE

REVISED AND EDITED BY
HENRY CAMPBELL BLACK, M. A.
AUTHOR OF A WORK ON CONSTITUTIONAL PROHIBITION

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EDITOR'S PREFACE.

THE late Professor POMEROY, during his editorship of the *West Coast Reporter*, published in that journal a series of articles on water-rights and riparian privileges in the Pacific states, which attracted much attention from the legal profession in those communities, and elicited high commendation by reason of their learning, candor, and comprehensive grasp of the subject. In consequence of the peculiarities of the law of riparian rights obtaining in California, Nevada, and the adjacent states and territories, the limited applicability of the common-law rules, the prevalence of that unique system known as the doctrine of appropriation, and the novelty and importance of the questions presented to the courts, the appearance of these articles was timely and significant, and they formed a valuable addition to the literature of the subject. The plates and copyrights of the *West Coast Reporter* having come into the ownership of the publishers of the present work, it was decided to reprint the articles in question in the form of a text-book; and they constitute the basis of the monograph now offered to the profession. It is to be regretted, for several reasons, that this undertaking could not have had the benefit of the author's own superintendence and revision; and especially because the doctrines and results of the later cases cannot, perhaps, be so harmoniously blended into the original work by a stranger's hand. But the editor has endeavored to perform this office to the best of his opportunities. Apart from the breaking of the work into chap-

ters, and the introduction of section numbers and appropriate head-lines, he has been scrupulous to preserve intact both the language and the arrangement of Professor POMEROY, making only such slight changes in phraseology as were rendered necessary by the altered form of publication. All the later authorities have been carefully collated, and their views and results—as also a considerable number of cases not cited by the author—have been incorporated in the work in one form or another. The general plan has been to make these interpolations in the way of additional foot-notes. But it was found that several topics of great importance were first broached by the later cases, and that points which were but imperfectly developed when the original articles were prepared had been clarified or enlarged upon. It then became necessary for the editor to write new sections; and these, being inserted in their proper connection, have added considerably to the bulk of the work. But in every instance of a new foot-note or a new section, the editor's material is to be distinguished from that of the author by the fact that it is inclosed in brackets. With a view to further facility in the use of the book, an index and a table of cases are added.

H. C. B.

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LAW OF RIPARIAN RIGHTS.

CHAPTER I.

INTRODUCTION.

- § 1. Importance of the subject—Need of legislation.
- 2. Object of the present work.
- 3. The problem stated.

§ 1. Importance of the subject—Need of legislation.

No special branch of the law of California, Nevada, and other commonwealths of the Pacific coast, is more practically important, and none is more uncertain, unsettled, and contradictory, than that which deals with the right to appropriate or use the waters of lakes and running streams, navigable or unnavigable, and with the conflicting rights of riparian proprietors to the same waters. The whole subject imperatively demands the most careful and complete legislation, which shall define the rights of all interested parties, and establish a code of rules regulating them upon a comprehensive and just basis, entirely independent, it may be, of the common-law doctrines. The great danger is—and the danger *is* very great—lest such legislation should be enacted wholly in favor of some one interest, to the exclusion of other interests equally real, but, perhaps, not so strongly pressed upon the legislature. To prevent such unjust discrimination, which would inevitably retard, if not completely stop, the development of the most valuable and permanent natural resources of these states, the following preliminary

conditions are essential: (1) The common-law rules concerning water-rights should be accurately apprehended, in order that it may be seen how far, and in what particulars, they are unfitted for the industrial pursuits, the mining, agricultural, grazing, manufacturing, and municipal interests of these Pacific communities. (2) The existing law of these states and territories, as founded upon statutory legislation, Spanish-Mexican laws, customs, and judicial decisions, should be carefully examined and formulated, as far as possible, so that its imperfections, omissions, advantages, and defects would be clearly disclosed and understood. With the knowledge obtained from such an investigation only, can the legislature construct a system of statutory rules which shall represent, harmonize, and protect all conflicting interests, as far as it is possible to provide for and protect all by a compromise in which each must make some surrender, must submit to some curtailment. Common justice requires some partial surrender by each in order that all may be benefited; and the chief difficulty lies in making an *equitable* apportionment of such burdens among all classes of proprietors. Statutes which recognized the rights of riparian owners alone, by simply enacting the common-law rules, would destroy the main usefulness of our streams, and stop the development of the great agricultural resources, by rendering any extensive system of irrigation practically impossible. On the other hand, statutes which should wholly ignore the interests of riparian proprietors would invade vested rights, and produce evils equally grave and far-reaching.

§ 2. Object of the present work.

As well for the purpose of furnishing a slight contribution towards such amendatory legislation, as for the purpose of discussing a subject of great importance to the legal profession, I intend, in the following pages, to examine the existing law con-

cerning Water-Rights and the Rights of Riparian Owners, as it prevails in the southern states and territories of the Pacific slope; to ascertain, as far as practicable, the rules which have been established by statute or by judicial decision; to point out the omissions, imperfections, contradictions, or questions left unsettled; and to compare these results generally with the common-law and the Spanish-Mexican systems. I may, in conclusion, suggest some amendments which might properly be made by the legislature.

§ 3. The problem stated.

In these Pacific states and territories, water is the one essential element of all productiveness and consequent prosperity. Its use for mining operations first attracted attention, and was the subject of some partial legislation. Its use for agricultural purposes of every kind has become far more important and beneficial, and more closely connected with the permanent welfare of these communities. Regions which are apparently most desert and sterile, can, with a sufficient supply of water, be turned into gardens, and made to "blossom as the rose." Nature has arranged abundant means and facilities for such an artificial supply. For example, in the great San Joaquin valley east of the San Joaquin river—which at times seems to be an expanse of dry sand—there is hardly an acre which cannot be reached by a well-constructed system of irrigation utilizing the water of the streams which rise in the high *sierras*, cross the valley at nearly equal intervals, and empty into the San Joaquin. With such irrigation, the whole valley would be, perhaps, the most fertile district in the world. I may remark in passing that never before did I so fully appreciate this wonderful transforming power of water, as after riding, some years ago, a whole day over the foot-hills, parched and browned and barren, I drove the few miles from the ferry at Merced Falls to the village of

Snelling, through what was in fact a rural paradise,—through green fields, roads overarched with rows of magnificent trees, and door-yards filled with flowers,—all the effect of irrigation obtained from the Merced. Similar illustrations may be seen in all parts of this state. But these uses of water for mining, for irrigation, for municipal purposes, necessarily diminish, to a very considerable extent, the natural and normal supply of the lakes and streams from which it is taken, and therefore conflict with the common-law rights of the riparian owners, and violate the settled doctrines of the common law. It is simply impossible to utilize water for any of these purposes, and then to return it, substantially unchanged, in amount and condition, to its original channels. The problem is to reconcile, or rather to adjust, these necessary uses, and the common-law rights and interests of all other and riparian proprietors. It will be expedient to state by way of preface, for purposes of comparison and illustration, the general doctrines of the common law; and this will be attempted in the following chapter.

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CHAPTER II.

THE COMMON-LAW DOCTRINE.

- § 4. Priority of appropriation gives no superior right.
- 5. Statement of leading cases.
- 6. Inland lakes and navigable streams.
- 7. Specific rules stated.
- 8. Riparian owner's right to natural flow of stream.
- 9. This right is parcel of the realty.
- 10. Diversion, when permissible.
- 11. Exceptions to common-law rule against appropriation.

§ 4. Priority of appropriation gives no superior right.

The common-law doctrine, in its most general form, is that the water of permanent running streams and of inland lakes is sacred to the common use alike of all the riparian proprietors upon their borders. This doctrine extends both to navigable and unnavigable streams and lakes which are wholly inland and territorial. Each proprietor may use the water for all reasonable purposes as it passes through or by his land, provided that he does not interfere with the public easement of navigation in all navigable lakes and streams; but he must, after its use, return it without substantial diminution in quantity or change in quality to its natural bed or channel, before it leaves his own land, so that it will reach his adjacent proprietor in its full, original, and natural condition. No priority of use or appropriation by any one proprietor can give him any higher or more extensive rights than these, as against other proprietors either higher up or lower down on the stream, or abutting on either side of him upon the shores of the lake. More extensive or exclusive rights than these against other riparian proprietors can only be acquired by grant from them, or by prescription which

presupposes a former grant.¹ Even the state, by its power of eminent domain, cannot give any more extensive or exclusive rights to one proprietor, under color of a public use, without making provision for compensation to all other proprietors whose natural rights would thus be invaded. This general doctrine, and all the detail of subordinate rules to which it leads, are fully sustained by the almost unanimous *consensus* of modern decisions; although there may be some *partial* deviations from its consequences in certain particulars in a few of the states.

§ 5. Statement of leading cases.

In the well-considered case of *Heath v. Williams*, 25 Me. 209, Mr. Justice Shepley briefly but accurately stated the general doctrine: "The cases decide that priority of appropriation of the water of a stream confers no exclusive right to the use of it. A riparian proprietor, who owns both banks of a stream, has a right to have the water flow in its natural current, without any obstruction injurious to him, over the whole extent of his land, unless his rights have been impaired by grant, license, or an adverse appropriation for more than twenty years." In *Tyler v. Wilkinson*, 4 Mason, 397, Judge Story said: "Of a thing common by nature there may be an appropriation by

¹ [In the United States it is well settled that mere prior occupancy or appropriation of the water of a running stream by a riparian owner, unless continued for such a length of time as to raise a presumption of a grant, can give no exclusive right thereto as against other owners above or below him on the same stream, except where the common law has been modified by local usage or by statutory enactment. *Heath v. Williams*, 25 Me. 209; *Evans v. Merriweather*, 3

Scam. 492; *Gilman v. Tilton*, 5 N. H. 231; *Cowles v. Kidder*, 24 N. H. 378; *Parker v. Hotchkiss*, 25 Conn. 321; *Keeney Manuf'g Co. v. Union Manuf'g Co.*, 39 Conn. 576; *Hartzall v. Sill*, 12 Pa. St. 248; *Pugh v. Wheeler*, 2 Dev. & B. 55; *Bliss v. Kennedy*, 43 Ill. 67; *Dumont v. Kellogg*, 29 Mich. 420; *Stillman v. White Rock Co.*, 3 Woodb. & M. 550; *Tyler v. Wilkinson*, 4 Mason, 397; *Ang. Water-Courses*, §§ 134, 350.]

general consent or grant. Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right. It is not like the case of mere occupancy, where the first occupant takes by force of his priority of occupancy. That supposes no ownership already existing, and no right to the use already acquired. But our law annexes to the riparian proprietorship the right to the use in common, as an incident to the land; and whosoever seeks to found an exclusive use, must establish a rightful appropriation in some manner known and admitted by the law. Now, this may be either by a grant from all the proprietors whose interest is affected by the particular appropriation, or by a long, exclusive enjoyment without interruption, which affords a just presumption of right." In *Pugh v. Wheeler*, 2 Dev. & B. 55, Ruffin, C. J., stated the general doctrine in the following somewhat fuller manner: "If one build a mill on a stream, and a person above divert the water, the owner of the mill may recover for the injury to the mill, although before he built he could only recover for the natural uses of the water, as needed for his family, his cattle, and irrigation; but, if instead of building a mill he had diverted the stream itself, he cannot justify it against a proprietor below, upon the ground that he had thus made an artificial use of the water before the other had made any such application of it. The truth is that every owner of land on a stream necessarily and at all times is using water running through it, if in no other manner, in the fertility it imparts to his land, and the increase in the value of it. There is therefore no prior or posterior in the use, for the land of each enjoyed it alike from the origin of the stream, and the priority of a particular new application or artificial use of the water does not, therefore, create the right to that use; but the existence or non-existence of that application at a particular time measures the damages of a wrongful act of another in derogation of the general right to the use of

the water as it passes to, through, or from the land of the party complaining. The right is not founded in user, but is inherent in the ownership of the soil, and, when a title by use is set up against another proprietor, there must be an enjoyment for such length of time as will be evidence of a grant, and thus constitute a title under the proprietor of the land. * * * The use to which one is entitled is not that which he happens to get before another, but it is that which, by reason of his ownership of land on the stream, he can enjoy on his land, and as an appurtenant to it."¹

§ 6. Inland lakes and navigable streams.

The same doctrine concerning the particular uses and appropriation of water by riparian owners is extended to inland lakes and streams which are navigable. This subject was recently considered by the New York court of appeals in the case of *Smith v. City of Rochester*, 92 N. Y. 463. In a very elaborate and learned opinion, that court decided (in June, 1883) that "riparian owners of land, adjoining fresh-water non-navigable streams, as an incident of their ownership acquire the right to the usufructuary enjoyment of the undiminished and undisturbed flow of said stream. This is also true of the fresh-water navigable streams and small lakes within the state where the tide does not ebb and flow; save that the public has an easement in such waters for the purpose of travel, as on a public highway, which easement, as it pertains to the sovereignty of the state, is inalienable, and gives to the state the right to use, regulate, and control the waters for the purposes of navigation. This public easement gives the state no right to convert the wa-

¹See also the elaborate editorial note to *Heath v. Williams*, 43 Amer. Dec. 269-279, in which numerous cases, English and Ameri-

can, are collected, and the special rules established by them are formulated.

ters, or to authorize their conversion, to any other uses than those for which the easement exists; that is, for the purposes of navigation. The right to divert the water for other uses, although public in their nature, can only be acquired under and by virtue of the sovereign right of eminent domain, and upon making just compensation. This doctrine concerning the rights of riparian owners does not, however, apply to the vast freshwater lakes or inland seas between the United States and Canada, nor to streams forming the boundary lines of states. The rights of riparian owners on the Hudson and Mohawk rivers, in New York, are derived from the rules of the civil law as it prevailed in the Netherlands during the colonial period." The facts of this case well illustrate the workings of the common-law rules. Hemlock lake is a small lake in the interior of New York, about seven miles long and one and a half wide. It is to a certain extent navigable, and has been navigated with small craft by the residents on its borders. The decision, it will be seen, treats it as navigable. Its surplus waters form a stream which is unnavigable. On this stream, near the outlet of the lake, the plaintiff has a mill, and the water of the stream was sufficient to keep the mill in operation throughout the entire year. In 1873, under authority conferred by the legislature of the state, the city of Rochester constructed a conduit or aqueduct from this lake to the city, for the purpose of furnishing a supply of water to its inhabitants. By this aqueduct over 4,000,000 gallons daily were drawn from the lake, and the flow of surplus water through the natural outlet was so diminished that the operations of the plaintiff's mill were seriously interfered with, and in some parts of the year entirely stopped. No compensation was paid or offered by the city to the plaintiff. On these facts the court held, in pursuance of the doctrines above quoted, that the plaintiff was entitled to relief against the city.

§ 7. Specific rules stated.

From this general doctrine, the following more specific rules necessarily follow. A riparian proprietor need not have actually appropriated the water of a stream, in order that he may be entitled to complain of a diversion by another proprietor; actual damages are not necessary, for damage is conclusively presumed from any such diversion.¹ A riparian proprietor cannot consume the entire stream for any purpose. He may appropriate the water for his own necessary uses, but this right must be reasonably exercised, and there must be no substantial diminution or waste.² The editorial note cited below, sums up the common-law doctrine, as the result of the American and English cases, as follows: "The general principle is that every owner of land through which a natural stream of water flows (or abutting on a natural inland lake) has a usufruct in the stream as it passes along, and has an equal right with those above and below him to the natural flow of the water in its accustomed channel, without unreasonable detention or substantial diminution in quantity or quality, and none can make any use of it prejudicial to the other owners, unless he has acquired a right to do so by license, grant, or prescription."

§ 8. Riparian owner's right to natural flow of stream.

[It is a familiar and uniform rule of the common law—recognized and enforced by the courts both in this country and in

¹Adams v. Barney, 25 Vt. 225. Nor is it any defense to an action for diverting water from a riparian proprietor to show that no injury would have accrued to him if he had not changed the manner or extent of his use, because, independent of any particular use of or for it, he has the right to the flow of the water on his own land without

diminution or alteration. *Buddington v. Bradley*, 10 Conn. 213.

²See *Adams v. Barney*, 25 Vt. 225; *Townsend v. McDonald*, 12 N. Y. 381; *Pillsbury v. Moore*, 44 Me. 154; *Bliss v. Kennedy*, 43 Ill. 67; and other cases cited in the editorial note in 43 *Amer. Dec.* 274, 275.

England—that every riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his land, in their accustomed channels, undiminished in quantity and unimpaired in quality; that no one can lawfully divert the water from his premises; and that none of the riparian owners can use the water to the material injury of those above or below him, although all have a right to the reasonable use of it for the ordinary purposes of life.¹ In this connection, the following language of Chancellor Kent is frequently cited, as embodying a terse and accurate statement of the rule: “Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands as it was wont to run, (*currere solebat*,) without diminution or alteration. No proprietor has a right to use the water to the prejudice of other proprietors, above or below him, unless he has a prior right to divert, or a title to

¹Embrey v. Owen, 6 Exch. 352; Wood v. Waud, 3 Exch. 748; Bealey v. Shaw, 6 East, 208; Mason v. Hill, 3 Barn. & Adol. 304; Wright v. Howard, 1 Sim. & S. 190; Orr Ewing v. Colquhoun, L. R. 2 App. Cas. 839; Chasemore v. Richards, 7 H. L. Cas. 349; Tyler v. Wilkinson, 4 Mason, 397; Pillsbury v. Moore, 44 Me. 154; Cowles v. Kidder, 24 N. H. 364; Tillotson v. Smith, 32 N. H. 90; Martin v. Bigelow, 2 Aiken, 184; Merrifield v. Lombard, 13 Allen, 16; Pratt v. Lamson, 2 Allen, 275; Springfield v. Harris, 4 Allen, 494; King v. Tiffany, 9 Conn. 162; Buddington v. Bradley, 10 Conn. 213; Wadsworth v. Tillotson, 15 Conn. 366; Clinton v. Myers, 46 N. Y. 511; Arnold v. Foot, 12 Wend. 330; Hoy v. Sterrett, 2 Watts, 327; Holsman v. Boiling Springs Co., 14 N. J. Eq. 335; Ten Eyck v. Delaware Canal

Co., 18 N. J. Law, 200; Mayor of Baltimore v. Appold, 42 Md. 442; Omelvany v. Jaggers, 2 Hill, (S. C.) 634; Hendrick v. Cook, 4 Ga. 241; Hendricks v. Johnson, 6 Port. (Ala.) 472; Potier v. Burden, 38 Ala. 651; Rhodes v. Whitehead, 27 Tex. 304; Shamleffer v. Council Grove Mill Co., 18 Kan. 24; Cooper v. Williams, 4 Ohio, 253; Case v. Weber, 2 Ind. 108; Dilling v. Murray, 6 Ind. 324; Mitchell v. Parks, 26 Ind. 354; Evans v. Merriweather, 3 Scam.; 492; Plumleigh v. Dawson, 1 Gilman, 544; Rudd v. Williams, 43 Ill. 385; Druley v. Adam, 102 Ill. 177; Davis v. Getchell, 50 Me. 604; Vliet v. Sherwood, 35 Wis. 229; Lux v. Haggin, (Cal.) 10 Pac. Rep. 753; Taylor v. Welch, 6 Or. 198; Coffman v. Robbins, 8 Or. 278; 3 Kent, Comm. *439; Ang. Water-Courses, § 95; Gould, Waters, § 204.

some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere*, is the language of the law. Though he may use the water while it runs over his land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."¹

§ 9. This right is parcel of the realty.

Although, as above stated, the riparian owner has no property in the water itself, but only a usufructuary enjoyment of it as it passes through or along his lands, yet it is not to be inferred that his right to have the stream flow in its natural channel, without diminution or alteration, is merely appurtenant to the estate, or conditioned upon his actual application of it to some beneficial use. "By the common law," say the court in California, "the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does not create the right, and disuse cannot destroy or suspend it. The right in each extends to the natural and usual flow of all the water, unless where the quantity has been diminished as a consequence of the reasonable application of it by other riparian owners for purposes hereafter to be mentioned."²

A right to the flow of water, then, is a corporeal right or hereditament which passes by grant of the land over which it runs.

¹3 Kent, Comm. *439.

²*Lux v. Haggin*, (Cal.) 10 Pac. Rep. 753; citing *Ang. Water-Courses*, § 93; *Shury v. Piggot*, Bulst. 339; *Countess of Rutland v. Bowler*, Palmer, 290; *Washb. Easem.* 319; *Gould, Waters*, § 204; *Johnson v. Jordan*, 2 Metc. 239; *Cary v. Daniels*, 5 Metc. 238; *Tyler*

v. Wilkinson, 4 Mason, 397; *Sampson v. Hoddinott*, 1 C. B. (N. S.) 590; *Hill v. Newman*, 5 Cal. 445; *Pope v. Kinman*, 54 Cal. 3; *Creighton v. Evans*, 53 Cal. 55; *Ferrea v. Knipe*, 28 Cal. 340; *Hale v. McLea*, 53 Cal. 578; *Hanson v. McCue*, 42 Cal. 303. See, also, *Wadsworth v. Tillotson*, 15 Conn. 366.

It may be conveyed absolutely, or lost or acquired, either wholly or in part, by an adverse user, sufficiently long, exclusive, and notorious to furnish adequate grounds for presumption of a grant.¹

§ 10. Diversion, when permissible.

It is also a right of the riparian owner, at common law, to have the stream flow in its natural channel without diversion. But this right extends no further than the boundaries of his own estate. He cannot complain of the mere fact of a diversion of the water-course, either above or below him, if, within the limits of his own property, it is allowed to follow its accustomed channel. Hence it is not unlawful to change the course of a stream within the limits of one's own land, if the stream is returned to its natural channel before leaving the land, and its flow is not materially diminished.²

§ 11. Exceptions to common-law rule against appropriation.

There are some cases, even at common law, where a prior appropriation will give the occupant superior privileges over the other proprietors on the same stream. Thus, in a Massachusetts decision, it is held that the riparian proprietor, who first erects his dam for reasonable mill purposes, has a right to maintain it as against proprietors above and below, although by so doing the others are prevented from placing dams and mills on their land. In such case, prior occupancy gives a prior right to such use. In the case referred to, Shaw, C. J., said: "The usefulness of water for mill purposes depends as well on its fall as its volume. But the fall depends upon the grade of the land over which it runs. The descent may be rapid, in which case

¹*Lux v. Haggin*, (Cal.) 4 Pac. Rep. 919.

²*Pettibone v. Smith*, 37 Mich. 579; *Norton v. Volentine*, 14 Vt. 239.

there may be fall enough for mill-sites at short distances; or the descent may be so gradual as only to admit of mills at considerable distances. In the latter case, the erection of a mill on one proprietor's land may raise and set the water back to such a distance as to prevent the proprietor above from having sufficient fall to erect a mill on his land. It seems to follow, as a necessary consequence from these principles, that in such case the proprietor who first erects his dam for such a purpose has a right to maintain it as against the proprietors above and below; and to this extent prior occupancy gives a prior title to such use. It is a profitable, beneficial, and reasonable use, and therefore one which he has a right to make. If it necessarily occupy so much of the fall as to prevent the proprietor above from placing a dam and mill on his land, it is *damnum absque injuria*. For the same reason the proprietor below cannot erect a dam in such a manner as to raise the water and obstruct the wheels of the first occupant. He had an equal right with the proprietor below to an equal use of the stream; he had made only a reasonable use of it; his appropriation to that extent, being justifiable and prior in time, necessarily prevents the proprietor below from raising the water, without interfering with a rightful use already made; and it is therefore not an injury to him. Such appears to be the nature and extent of the prior and exclusive right which one proprietor acquires by a prior reasonable appropriation of the use of the water in its fall; and it results, not from any originally superior legal right, but from a legitimate exercise of his own common right, the effect of which is, *de facto*, to supersede and prevent a like use by other proprietors originally having the same common right. It is, in this respect, like the right in common, which any individual has, to use a highway. While one is reasonably exercising his own right, by a temporary occupation of a particular part of a street with his carriage or team, another cannot occupy the same

place at the same time."¹ It is to be remarked, however, that the appropriation here sanctioned was not of the stream itself,—at least, not to its whole extent,—but only of its power to drive machinery. The other riparian owners would continue in the enjoyment of the water for all the purposes to which it could ordinarily be put, except this one. Hence this apparent departure from the doctrine of the common law could not be invoked in aid of one who should entirely divert the water-course, or appropriate its whole volume to his private uses. And it is proper to add that this rule has been repudiated in certain other states, or else conditioned upon a continuance of the appropriation for such a period of time as would be requisite to establish rights by prescription.²]

¹Cary v. Daniels, 8 Metc. 466, s. c. 41 Amer. Dec. 532. And see Gould v. Boston Duck Co., 13 Gray, 451; Fuller v. Chicopee Manuf'g Co., 16 Gray, 44; Smith v. Agawam Canal Co., 2 Allen, 357; Pratt v. Lamson, Id. 288; Lowell v. Boston,

111 Mass. 465; Lincoln v. Chadbourne, 56 Me. 197; Miller v. Troost, 14 Minn. 365, (Gil. 282.)

²See Parker v. Hotchkiss, 25 Conn. 321; Keeney Manuf'g Co. v. Union Manuf'g Co., 39 Conn. 576; Dumont v. Kellogg, 29 Mich. 420.

CHAPTER III.

APPROPRIATION OF WATERS FLOWING THROUGH THE
PUBLIC DOMAIN.

I. ORIGIN AND BASIS OF THE RIGHT TO APPROPRIATE.

- § 12. Scope of the present chapter.
- 13. Early importance of mining interests.
- 14. Mining customs.
- 15. Doctrine of appropriation.
- 16. Appropriation not at first availing as against the government.
- 17. The act of congress of 1866.
- 18. Limits of the doctrine of appropriation — The early cases.
- 19. Views of the United States supreme court.
- 20. Grounds of these decisions.
- 21. Doctrine of appropriation unknown to the common law.
- 22. Basis of right to appropriate water.
- 23. Grounds for presumption of license.
- 24. Efficacy of miners' customs.

II. APPROPRIATION AS AGAINST THE SUBSEQUENT GRANTEE OF THE
GOVERNMENT.

- § 25. Title of subsequent grantee is subject to prior appropriation.
- 26. California decisions on this point.
- 27. Views of United States supreme court.
- 28. The act of 1870 is declaratory only.
- 29. Public lands of the state.

III. THE RIGHT RESTRICTED TO THE PUBLIC DOMAIN.

- § 30. Appropriation confined to public lands.
- 31. Jurisdiction of state and United States distinguished.
- 32. Power of government to annex conditions to grants.

IV. CONFLICTING CLAIMS BETWEEN SETTLERS AND APPROPRIATORS.

- § 33. Converse of doctrine of appropriation.
- 34. When title from United States is perfected.
- 35. When patentee's riparian rights vest.
- 36. Review of the authorities on this point.
- 37. Riparian rights protected.
- 38. Doctrine of relation applied to patentees.
- 39. Grounds for the application of this doctrine.
- 40. California decisions.
- 41. Review of the cases.
- 42. Riparian rights under Mexican grants.
- 43. Summary of conclusions.

I. ORIGIN AND BASIS OF THE RIGHT TO APPROPRIATE.

§ 12. Scope of the present chapter.

Having stated the fundamental doctrines of the common law concerning the use of running streams and small inland lakes, and the rights of riparian owners, as established by the general *consensus* of English and American decisions, I shall proceed to examine, with more of detail, the variations from these doctrines which have been made by the courts or recognized by the legislation of the Pacific commonwealths. In this division of the subject it will be expedient to notice, in the first place, certain matters, connected with various conditions of fact, which may be regarded as settled, and subsequently to discuss those questions which are still open, and which admit of conflicting opinions, or involve, perhaps, a conflict of decision.

§ 13. Early importance of mining interests.

From the time of the discovery of gold in California the mining interests became, and for many years continued to be in that state, and still are in other Pacific states and territories, of paramount importance, to which agriculture, manufacturing, and all other industries were subordinated. The lands containing the minerals belonged almost entirely to the public domain of the United States. Vast numbers of immigrants poured over these mineral regions, settled down in every direction, appropriated parcels of the territory to their own use, and were prospecting and mining in every mode rendered possible by their own resources, under no municipal law, and with no restraint except that of superior physical force. "The world has probably never seen a similar spectacle,—that of extensive gold fields suddenly peopled by masses of men from all states and coun-

tries, restrained by no law, and not agreed as to whence the laws ought to emanate by which they would consent to be bound.”¹

§ 14. Mining customs.

In this condition of affairs, the miners themselves adopted certain “mining customs” to which they yielded a voluntary obedience, and which were afterwards recognized and sanctioned by the legislation of the state and of congress. Scattered over the territory at “camps,” “bars,” and “diggings,” the miners held meetings in each district or locality, and enacted regulations by which they agreed to be governed. The rules once adopted were enforced with rigor upon all settlers in the particular camp. The legislature of California, at the session of 1851, gave to these voluntary regulations a legal and compulsive efficacy by the following brief but admirably comprehensive statute: “In actions concerning mining claims, proof shall be admitted of the customs, usages, or regulations established or in force at the bar or diggings embracing said claims, and such customs, usages, or regulations, when not in conflict with the constitution and laws of this state, shall govern the decision of the action.” These “mining customs” or rules were simple, and related to the acquisition of “claims” to mineral lands and to water for the purposes of mining, and prescribed the acts necessary to constitute such an appropriation of a parcel of mineral land or portion of a stream as should give the claimant a prior right against all others, the amount of work which would entitle him to a continued possession and enjoyment, what would constitute an abandonment, and similar matters.² In this proceeding we find the origin of the peculiar doctrines concerning water-rights as set-

¹As to the early history of gold mining on the Pacific coast, the customs adopted by the miners, the origin of the right to appropri-

ate water, etc., see remarks of Field, J., in *Jennison v. Kirk*, 98 U. S. 453.

²See *infra*, § 24.

bled in the Pacific communities. Water was an indispensable requisite for carrying on mining operations; a permanent right to use certain amounts of water was as essential as the permanent right to occupy a certain parcel of mineral land. The streams and lakes were all on the public domain. For their advantageous employment it was often necessary to divert water from its natural bed, and to carry it through artificial channels,—"ditches" or "flumes,"—sometimes of great length and constructed at an enormous cost. There were no riparian owners or occupants except the miners, and the streams could be put to no beneficial use except for purposes of mining. From all these circumstances, and from the very necessities of the situation, it universally became one of the mining customs or regulations that the right to use a definite quantity of water, and to divert it if necessary from these streams and lakes, could be acquired by prior appropriation.

§ 15. Doctrine of appropriation.

The custom thus originating was soon approved by the courts, and the doctrine became and still is settled in California and other Pacific states and territories, in opposition to the common law, that a permanent right of property in the water of streams or inland lakes, which wholly ran through or were situate upon the public lands of the United States, may be acquired for mining purposes by mere prior appropriation; that a prior appropriator may thus acquire the right to divert, use, and consume a quantity of water from the natural flow or condition of such streams or lakes, which may be necessary for the purposes of his mining operations; and that he becomes, so far as he has thus made an actual prior appropriation, the owner of the water as against all the world, except the United States government. This doctrine, applied at first to the operations of mining, has been extended to all other beneficial purposes for which water may be

essential,—to milling, manufacturing, agricultural, irrigating, and municipal purposes.¹

§ 16. Appropriation not at first availing as against the government.

[It is very important to be noted that the right of property in running waters by appropriation, thus recognized by the courts and sanctioned by legislation, had as yet acquired no validity whatever as against the federal government or its grantee. In this respect, however clear might be the superior rights of a prior appropriator as against another person not the owner of the soil, they acquired no sanction as against the United States, or its patentee, until the act of congress of 1866. Hence it has never been held by the supreme court of the United States, or by the state courts, that an appropriation of water on the public domain, made after the act of congress of 1866, (or that of 1870,) gave to the appropriator the right to the water appropriated as against a grantee of riparian lands under a grant made or issued *prior* to the act of 1866, except in a case where the water so subsequently appropriated was reserved by the

¹ *California*. Parks Canal, etc., Co. v. Hoyt, 57 Cal. 44; Hill v. Smith, 27 Cal. 480; Wixon v. Bear River, etc., Co., 24 Cal. 367; Phoenix W. Co. v. Fletcher, 23 Cal. 481; Kidd v. Laird, 15 Cal. 162; Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear River, etc., Co., Id. 220; Bear River, etc., Co. v. New York Min. Co., 8 Cal. 327; Crandall v. Woods, Id. 136; Hill v. King, Id. 336; Hoffman v. Stone, 7 Cal. 46; Kelly v. Natoma W. Co., 6 Cal. 107; Hill v. Newman, 5 Cal. 445; Irwin v. Phillips, Id. 140; and see, also, Macris v. Bicknell, 7 Cal. 261, 262; Nevada, etc., Co. v. Kidd, 37 Cal. 282, 312; Farley v. Spring Valley M.

Co., 58 Cal. 142; Himes v. Johnson, 61 Cal. 259. *Nevada*. Strait v. Brown, 16 Nev. 317; Barnes v. Sabron, 10 Nev. 217; Ophir Silver M. Co. v. Carpenter, 4 Nev. 534; Lobdell v. Simpson, 2 Nev. 274. *Colorado*. Schilling v. Rominger, 4 Colo. 100. *Utah*. Crane v. Winsor, 2 Utah, 248. *Montana*. Atchison v. Peterson, 1 Mont. 561. *For purposes of irrigation, etc.* Barnes v. Sabron, 10 Nev. 217; Lobdell v. Simpson, 2 Nev. 274. *Of manufacturing or milling.* McDonald v. Bear River, etc., Co., 13 Cal. 220; Ortman v. Dixon, Id. 33; and see note in 43 Amer. Dec. 279, 280.

terms of such grant.¹ This principle is asserted—and is clearly deduced from the authorities—in a recent decision of the supreme court of California;² from which we quote as follows: “In the case of *Van Sickle v. Haines*, 7 Nev. 249, the plaintiff had diverted one-fourth of the water of Daggett creek in the year 1857. He made the diversion at a point then on the public land, but which, in 1864, was patented by the United States to the defendant Haines. In 1865, Vansickle obtained a patent for his own land, where he used the water. In 1867, Haines constructed a wood flume on his land, and turned into it all the water of the stream, thereby depriving the plaintiff of that part of it which he had been using. The supreme court of Nevada held that the plaintiff, by his appropriation of water *prior* to the date of defendant's patent, acquired no right which could affect that grant; and that while the act of congress of July, 1866, protected those who at that time were diverting water from its natural channels on the public lands; and while all patents issued or titles acquired from the United States since that date are obtained subject to the rights of water by appropriation existing at that time, yet, with respect to patents for riparian lands issued *before* the act of congress, the patentee had already acquired the right to the flow of the water, with which congress could not interfere.” The court continued: “*Broder v. Water Co.*, 101 U. S. 274, may appear to be in conflict with *Vansickle v. Haines*. But is there any real conflict? It will be observed that the *Broder* Case turned (so far as the plaintiff's title from the railroad company was concerned) on the reservation clause in the act constituting the grant to the company, and the court held that ‘a lawful claim,’ within the meaning of the reservation in the act of 1864, was ‘any honest claim evidenced by improvements and other acts of possession.’ The

¹*Lux v. Haggin*, (Cal.) 10 Pac. Rep. 724.

²*Id.* 725.

construction given to the language of the reservation, of course, implies that those who appropriated lands or waters on the public lands, prior to the acts of 1864 or 1866, had not been treated by the government in those acts as mere trespassers, but as there by license. It does not imply that they had acquired any title which could be asserted against the United States or its grantees, except so far as their occupations of land or water were protected and reserved to them by acts of congress.”]

§ 17. The act of congress of 1866.

The right of property thus settled by state courts availed against all persons except the United States government. This limitation was soon removed. The United States government recognized the right to water on the public domain, thus acquired by prior appropriation, as a substantial and valid right which the government was bound to acknowledge and protect; and it repeatedly approved and adopted the doctrine which had sprung from the mining customs and been settled by the state and territorial decisions.¹ This view was expressly confirmed by a statute of congress passed July 26, 1866:² “Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and respected in the same; and the right of way for the construction of ditches and canals, for the purposes herein specified, is acknowledged and confirmed.” This statute, it is held by the United States supreme court, does not create the right; but it is “rather a voluntary recognition of a pre-existing right of possession, con-

¹Broder v. Natoma Water Co., 20 Wall. 670; Atchison v. Peterson, 101 U. S. 274; Basey v. Gallagher, Id. 507.

²Rev. St. U. S. § 2339.

stituting a valid claim to its continued use, than the establishment of a new one."¹

§ 18. Limits of the doctrine of appropriation—The early cases.

It will aid in the subsequent examination of the open questions to fix the exact extent and limits of the doctrine thus formulated, and to ascertain the grounds upon which it was rested by the courts. A very few of the earliest cases enter into no discussion, and seem to speak as though the rule were universal, applicable to all waters under all circumstances.² But most of these early decisions state the reasons for the doctrine in the most express manner, and thus indicate its grounds, extent, and limits. One or two illustrations will suffice. In *Hoffman v. Stone*,³ Murray, C. J., said: "The former decisions of this court, in cases involving the right of parties to appropriate waters for mining and other purposes, have been based upon the *wants of the community, and the peculiar condition of things in this state*, (for which there is no precedent,) rather than any absolute rule of law governing such cases. The absence of legislation on this subject has devolved on the courts the necessity of framing rules for the protection of this great interest, and in determining these questions we have conformed, as nearly as possible, to the analogies of the common law. The fact early manifested itself, that the mines could not be successfully worked without a proprietorship in waters, and it was recognized and maintained. To protect those who, by their energy, industry, and capital, had constructed canals and races carrying water for miles into

¹ *Broder v. Natoma Water Co.*, 101 U. S. 274. The act of congress of 1866 merely confirms to land-owners the rights and privileges they had formerly enjoyed by local customs and the decisions of

the courts. *Jones v. Adams*, (Nev.) 6 Pac. Rep. 442.

² See, for example, *Hill v. Newman*, 5 Cal. 445; *Kelly v. Natoma W. Co.*, 6 Cal. 107.

³ 7 Cal. 47, 48, (1875.)

parts of the country which must have otherwise remained unfruitful and undeveloped, it was held that the first appropriator acquired a special property in the waters thus appropriated; and, as a necessary consequence of such property, might invoke all legal remedies for its enjoyment or defense. A party appropriating water has the sole and exclusive right to use the same for the purposes for which it was appropriated, and, so long as he is not obstructed in the use thereof, he has no ground of action."

It should be observed that the waters referred to in this opinion were all upon public lands. In the case of *Bear River Min. Co. v. New York Min. Co.*¹ the reasons for the doctrine were stated by Mr. Justice Burnett more fully: "It may be said with truth that the judiciary of this state has had thrown upon it responsibilities not incurred by the courts of any other state in the Union. We have had a large class of cases unknown in the jurisprudence of our sister states. The mining interest of the state has grown up under the force of new and extraordinary circumstances, and in the absence of any specific and certain legislation to guide us. Left without any direct precedent, as well as without specific legislation, we have been compelled to apply to this anomalous state of things the analogies of the common law and the more expanded principles of equitable justice. There being no known system existing at the beginning, parties were left without any certain guide, and for that reason have placed themselves in such conflicting positions that it is impossible to render any decision which will not produce great injury, not only to the parties immediately connected with the suit, but to large bodies of men, who, though not formal parties to the record, must be deeply affected by the decision. No class of cases can arise more difficult of a just solution, or more dis-

¹8 Cal. 327, 332, (1875.)

tressing in practical result. The business of gold mining was not only new to our people, and the cases arising from it new to our courts, and without judicial or legislative precedent, either in our own country or in that from which we have borrowed our jurisprudence, but there are intrinsic difficulties in the subject itself which it is almost impossible to settle satisfactorily, even by the application to them of the abstract principles of justice. Yet we are compelled to decide these cases, because they must be settled in some way, whether we can say, after it is done, that we have given a just decision or not. The uses of water for domestic purposes, and for the watering of stock, are preferred uses, because essential to sustain life. Other uses must be subordinate to these. In such cases the element is entirely consumed. Next to these may properly be placed the use of water for irrigation in dry and arid countries. In such cases the element is almost entirely consumed. Under a proper system of irrigation, only so much water is taken from the stream as may be needed, and the whole is absorbed or evaporated. Entire absorption is the contemplated result of irrigation. Where properly used as a motive power for propelling machinery, the element is not injured, because the slight evaporation occasioned by the use is unavoidable, and is not esteemed by the law a substantial injury. Considering the different uses to which water is applied in countries governed by the common law, it is not so difficult to understand the principles which regulate the relative rights of the different riparian proprietors. As to the preferred uses, each proprietor had the right to consume what was necessary, and after doing this he was bound to let the remaining portion flow, without material interruption or deterioration, in the natural channel of the stream to others below him. If the volume of water was not sufficient for all, then those highest up the stream were supplied in preference to those below. [The correctness of the proposition contained in this

sentence, as a common-law rule, may be questioned.] So far as the preferred uses were concerned, no one was allowed to deteriorate the quality of the water; and, for the purposes of a motive power, there was no use of the element which could impair its quality. But in our mineral region we have a novel use of water, that cannot be classed with the preferred uses, but still a use which deteriorates the quality of the element itself, when wanted a second time for the same purposes. In cases heretofore known, either the element was entirely consumed, or else its use did not impair its quality when wanted again for the same purpose. This fact constitutes the great difficulty in this and other like cases. If the use of water for mining purposes did not deteriorate the quality of the element itself, then the only injury that could be complained of would be the diminution in the quantity and the interruption in the flow. In repeated decisions of this court, it has been uniformly held that the miners were in the possession of the mineral lands under a license from both the state and the federal governments. This being conceded, the superior proprietor must have had some leading object in view when granting this license; and that object must have been the working of these mineral lands to the best advantage. The intention was to distribute the bounty of the government among the greatest number of persons, so as most rapidly to develop the hidden resources of this region; while at the same time the prior substantial rights of individuals should be preserved. In the working of these mines water is an essential element; therefore that system which will make the most of its use, without violating the rights of individuals, will be most in harmony with the end contemplated by the superior proprietor."

The conclusion was reached in this and other cases that the right of the first appropriator of water from a stream on the public domain is equally protected, so far as the *quantity* is con-

cerned, from damage occasioned by subsequent locators above him, as well as below him. But as to the deterioration in the *quality* alone of the water, by reason of its being used by others for mining purposes before it reaches the ditch of the prior appropriator, this must be deemed *damnum absque injuria*. Any other rule, it was said, would involve an absolute prohibition of the use of *all* the water of a stream above any prior appropriator, in order to preserve the quality of a small portion taken by him from the stream.

§ 19. Views of the United States supreme court.

It may be instructive to compare these early views of the California court with the recent judgments pronounced by the supreme court of the United States. In *Atchison v. Peterson*,¹ which came up from Montana, Mr. Justice Field said: "By the custom which has obtained among miners in the Pacific states and territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or to use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property. As respects the use of water for mining purposes, the doctrines of the common law declaratory of the rights of riparian owners were, at an early day, after the discovery of gold, found to be inapplicable, or applicable only in a very limited extent, to the necessities of the miners, and inadequate to their protection. By the common law the riparian owner on a stream not navigable takes the land to the center

¹20 Wall. 507, (1874.)

of the stream, and such owner has the right to the use of the water flowing over the land as an incident to his estate." The judge gives a summary of the common-law doctrines as they are stated in the preceding chapter, and then proceeds as follows: "This equality of right [at the common law] among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its convenience for mining purposes to points from which it could not be restored to the stream. But the government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrines of riparian proprietorship with respect to the waters of these streams. The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated, and open to general exploration, does in natural justice acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public land throughout the Pacific states and territories, by their customs, usages, and regulations, everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those states and territories." He quotes from some of the early California decisions hereinbefore cited, and further says: "This doctrine of right by prior appropriation was recognized by the legislation of congress in 1866, [quoting the statute of congress.] The right to water by prior appropriation, thus recognized and established as the law of miners on the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made." Hav-

ing thus explained the origin of the doctrine, the opinion goes on to state more particularly the extent and limits of the right thus acquired, the relations of the appropriator with other occupants, and the like. This portion of the opinion will be quoted in connection with subsequent discussions. In the case of *Basey v. Gallagher*,¹ the same doctrine was applied by the United States supreme court to all other beneficial purposes for which water is essential, as well as to mining. Mr. Justice Field, after quoting the decision in *Atchison v. Peterson*, said: "The views there expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in the states and territories of the Pacific coast by the customs of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one." He quotes an early California decision to this effect,² and proceeds: "Ever since that decision it has been held generally throughout the Pacific states and territories that the right to water by prior appropriation for any beneficial purpose is entitled to protection. Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use, and vest an absolute monopoly in a single individual. The act of congress of 1866 recognizes the right to water by prior appropriation for

¹20 Wall. 671, (1874.)²*Tartar v. Spring V. M. Co.*, 5 Cal. 397, (1855.)

agricultural and manufacturing purposes, as well as for mining.

* * * It is evident that congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water, which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or by the decisions of the court. The union of the three conditions, in any particular case, is not essential to the perfection of the right by priority; and, in case of conflict between a local custom and a statutory regulation, the latter, as of superior authority, must necessarily control."

These extracts have been given for a definite purpose, and they have a most important bearing upon the future discussion of other questions.

§ 20. Grounds of these decisions.

It is essential, to any accuracy in such discussions, that we should ascertain at the outset the exact grounds of the peculiar doctrine which lies at the foundation of the entire law concerning water-rights in the Pacific communities. The question will afterwards rise whether this doctrine determines all the special rules which may apply to all circumstances and to all conditions of ownership; or whether, on the other hand, this doctrine only partially displaces the common law, leaving it applicable under different circumstances and conditions. It is plain, upon the most superficial examination, that the opinions which have been quoted—and the same is true of other cases—do not profess to derive their conclusions from the common law. On the contrary, they openly avow that these conclusions are directly opposed to the common law. They base their reasoning and its results upon the peculiar social and industrial needs of the early settlers, especially the miners; upon the condition of the

public domain in which the mining was carried on; upon the evident intention of the federal government in throwing open the mineral wealth of the public lands to all comers, so that its advantages might be enjoyed equally by all persons; and upon the fact that the common-law rules would defeat this intention, and retard, if not wholly destroy, the development of the mineral resources. Although this departure from the common law was, at the very first, made with reference solely to the use of water for mining, it was soon necessarily extended to all other beneficial uses. There are undoubtedly some *dicta* to be found in a few of the California cases which seem to assume or to suppose that the conclusions reached by the court were in agreement with the common-law doctrines. These *dicta* differ widely from the general course of reasoning pursued by the state judges, and especially from that adopted by the United States supreme court; and they are, as it seems to me, utterly irreconcilable with many subsequent decisions, establishing more special rules, made by the state and the federal courts.

§ 21. Doctrine of appropriation unknown to the common law.

It has been urged, although the position has never, I believe, been sustained by any authoritative decision in the Pacific states or territories, that the common law, in its early and original form, recognized and permitted a prior appropriation of the waters of running streams; that the contrary rules, as laid down by Story and Kent, and as they are briefly formulated in our second chapter, are a modern departure from the primitive common law, first made by some comparatively recent English decisions; and that, as a necessary consequence, these original common-law doctrines, denying what are ordinarily called "riparian rights," and not the modern innovations acknowledging such rights, are binding upon and should be followed by the

courts of the Pacific commonwealths. In alleged support of this view, reference has been made, among others, to some New York decisions.¹ Into the discussion of this question I shall not at present enter. In the very recent case decided by the New York court of appeals,² described in our second chapter, the same position was urged by counsel. As a consequence, the common-law doctrine was examined by the court with much learning and ability, the early authorities were copiously cited, and the conclusions reached were in complete accordance with the common-law rules as they are universally understood at the present time by the courts of England and of the United States. The cases of *People v. Canal Appraisers*, and others like it, which seem to be antagonistic, it is shown are confined to the Mohawk and the Hudson rivers, the rights of riparian owners on these two streams being derived, not from the common law, but from the civil law, as it prevailed in the Netherlands during the colonial periods.

§ 22. Basis of right to appropriate water.

[Prior to the act of congress already referred to, there was no legislation emanating from the federal government which directly authorized the exclusive appropriation of water-courses on the public domain. The right of a miner to go upon the public lands of the United States, and there appropriate to his own use the water of a running stream, and to hold the same against any person who should subsequently attempt to divert it from him, could be based upon no grant, statute, or express permission. This right, if it was to receive legal recognition at all,

¹For example, to *People v. Canal Appraisers*, 33 N. Y. 461.

²*Smith v. City of Rochester*, 93 N. Y. 463. In the case of *Lux v. Haggin*, (Cal.) 10 Pac. Rep. 753, the supreme court of California re-

marked: "In examining the numerous cases which establish that the doctrine of appropriation is *not* the doctrine of the common law, we meet an embarrassment of abundance."

must be made to rest upon some other foundation than that of positive law. Hence the courts—in order to protect the vast interests which had grown up under the mining systems, and to give legal sanction to the rights thus acquired—invoked the common-law doctrine of presumption, and implied, from all the circumstances, a *license* from the United States to the appropriator of water, commensurate with any rights which he could justly claim. Thus it is said: “From a very early day the courts of this state have considered the United States government as the owner of running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was *allowed* or *licensed* by the United States.”¹

§ 23. Grounds for presumption of license.

If we inquire as to the grounds on which this presumption of a license from the government is built, we shall find the question satisfactorily answered in an early decision of the California supreme court. It was observed by a learned judge: “One of the favorite and much-indulged doctrines of the common law is the doctrine of presumption. Thus, for the purpose of settling men’s differences, a presumption is often indulged where the fact presumed cannot have existed. In support of this proposition I will refer to a few eminent authorities.
* * * In these cases presumptions were indulged against the truth,—presumptions of acts of parliament and grants from

¹Lux v. Haggin, (Cal.) 10 Pac. Rep. 721.

the crown. It is true the basis of the presumption was length of time, but the reason of it was to settle disputes, and to quiet the possession. If, then, lapse of time requires a court to raise presumptions, other circumstances which are equally potent and persuasive must have the like effect for the purposes of the desired end; for lapse of time is but a circumstance or fact which calls out the principle, and is not the principle itself. Every judge is bound to know the history, and the leading traits which enter into the history, of the country where he presides. This we have held before, and it is also an admitted doctrine of the common law. We must therefore know that this state has a large territory; that upon its acquisition by the United States, from the sparseness of its population, but a small comparative proportion of its land had been granted to private individuals; that the great bulk of it was land of the government; that but little as yet has been acquired by individuals by purchase; that our citizens have gone upon the public lands continuously from a period anterior to the organization of the state government to the present time. Upon these lands they have dug for gold; excavated mineral rock; constructed ditches, flumes, and canals for conducting water; built mills for sawing lumber and grinding corn; established farms for cultivating the earth; made settlements for the grazing of cattle; laid off towns and villages; felled trees; diverted water-courses; and, indeed, have done, in the various enterprises of life, all that is useful and necessary in the high condition of civilized development. All of these are open and notorious facts, charging with notice of them not only the courts who have to apply the law in reference to them, but also the government of the United States, which claims to be the proprietor of these lands, and the government of the state within whose sovereign jurisdiction they exist. In the face of these notorious facts the government of the United States has not attempted to assert any right of own-

ership to any of the large body of lands within the mineral region of the state. The state government has not only looked on quiescently upon this universal appropriation of the public domain for all of these purposes, but has studiously encouraged them, in some instances, and recognized them in all. Now, can it be said, with any propriety of reason or common sense, that the parties to these acts have acquired no rights? If they have acquired rights, these rights rest upon the presumption of a grant of right, arising either from the tacit assent of the sovereign, or from expressions of her will in the course of her general legislation, and, indeed, from both. Possession gives title only by presumption. Then, when the possession is shown to be of public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption, for a license to occupy from the owner will be presumed."¹

At the same time it must be remembered that there was never any license, *in fact*, from the government to the miners on the Pacific coast to work the mines. Congress had adopted no specific action on the subject. The supposed license consisted in the forbearance of the government; any other license would rest in mere assertion, and would be untrue in fact and unwarranted in law.²

§ 24. Efficacy of miners' customs.

It may not be inappropriate to add a few words to the account given by our author of the origin and nature of "mining customs."³ It is said by the court in California: "It has always been held that local regulations, etc., accepted by the miners of a particular district, are binding only as to possessory rights

¹Conger v. Weaver, 6 Cal. 556, 557.

²Boggs v. Merced Min. Co., 14 Cal. 355.

³*Supra*, § 14.

within the district, and that they must be proved as a fact. When they have been proved, the courts have considered them only for the purpose of ascertaining the extent and boundaries of the alleged possessions of the respective parties, and the priority of possessory right as between them, or for the purpose of ascertaining whether the right of action has been lost or abandoned by failure to work and occupy in the manner prescribed. When the priority, limits, and continuation of a possession have thus been ascertained, the courts have proceeded to apply the presumption of a grant from the paramount source,—a presumption, we repeat, sustainable on common-law principles.”¹ The principal efficacy of the mining customs, then, is this: that, where any local mining custom exists, controversies affecting a mining right must be solved and determined by the rules and usages of the bar or diggings embracing the claim to which such right is asserted or denied, whether such customs or usages are written or unwritten. Legislation, it is added, could not entirely supplant the force of these customs. They are of a different character from common-law customs; for the latter must be of immemorial tradition.² But a custom or usage is void whenever it falls into disuse, or is generally disregarded.³ The existence of mining rules and customs is a question of fact; and it is further required that they should be reasonable.⁴

It remains to be added that the mining customs are recognized as valid and binding only when they are not in conflict with any constitutional or statutory provision, either of the state or the United States.⁵ Thus, no custom of miners could legalize those effects of the system of hydraulic mining which have come

¹Lux v. Haggin, (Cal.) 10 Pac. Rep. 748.

²Morton v. Solambo Copper M. Co., 26 Cal. 527.

³Harvey v. Ryan, 42 Cal. 626.

⁴King v. Edwards, 1 Mont. 235.

And see Irwin v. Phillips, 5 Cal. 140, s. c. 63 Amer. Dec. 113.

⁵Code Civil Proc. Cal. § 748, and St. 1851, p. 149, § 621. See, also, Rev. St. U. S. §§ 2319, 2324.

to be regarded by the courts as a public nuisance. On this point it is said: "A custom or usage attempted to be established, whereby mining *debris* might be sent down to the valleys, devastating the lands of private owners, holding titles in fee from the Mexican government, as old as the title of the United States, without first acquiring the right to do so by purchase or other lawful means, upon compensation paid, would be in direct violation both of the laws and constitution of the state and of the constitution of the United States. Instead of being authorized by the statute, it would be in direct violation of the statute. It would also be in direct violation of the express provisions of the statutes defining nuisances."¹]

II. APPROPRIATION AS AGAINST THE SUBSEQUENT GRANTEE OF THE GOVERNMENT.

§ 25. Title of subsequent grantee is subject to prior appropriation.

Where a stream or lake was throughout its entire extent on the public land, the prior appropriator obtained a right, we have seen, good against all the world except the federal government. The government might have denied this right and treated it as non-existing. On the contrary, congress formally acknowledged it, and by the declaratory statute of 1866 made the national ownership of the public domain bordering on the stream or lake subject to the claims and uses of the prior appropriator. Wherever the title of the United States to any portion of the public domain was thus burdened, the same burden would, on general principles, accompany the title if transferred to any subsequent or private owner; whoever succeeded to the title of the United States, through any mode of acquisition or

¹Woodruff v. North Bloomfield G. M. Co., 9 Sawy. 441, s. c. 18 Fed. Rep. 801.

conveyance, would acquire and hold it subject to the same servitude which before existed in favor of the prior appropriator. This consequence would naturally follow from the operation of well-settled principles, independently of any express enactment; but it has not been thus left as a matter of inference. By an act of July 9, 1870, amending the statute of 1866, congress has provided "that all patents granted, or pre-emptions or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the ninth section of the act of which this is amendatory;" *i. e.*, act of July 26, 1866.

§ 26. California decisions on this point.

In the recent case of *Osgood v. El Dorado Water Co.*,¹ it appeared that the plaintiff, Osgood, first went upon a certain tract of public land bordering on a stream, in 1863, and had resided there ever since. The land at the time was unsurveyed. The land was surveyed by the government surveyor in 1865. The plaintiff filed his declaratory statement as a pre-emptor in June, 1868; in June, 1870, he had completed his payments; and on October 25, 1871, he received his patent from the United States. In March, 1867, the predecessors of the defendant had posted a notice of their appropriation of the waters of the same stream which ran through the plaintiff's tract. From that date they had been engaged in constructing a ditch or canal, and were in active prosecution of the work at the time plaintiff obtained his patent, although they did not finally complete it until some time after that date. The action was brought to restrain the defendant from diverting the water, based upon the plaintiff's asserted rights as a riparian owner. The court held that the plaintiff's rights

¹56 Cal. 571, (1880.)

accrued only from the date of his patent, and did not relate back to the time of his first settlement, or of his filing a declaration of pre-emption.¹ The defendant was thus in the position of a prior appropriator. In determining the rights of such an appropriator against a subsequent grantee from the United States, the court entered into no discussion of the question upon principle. It rested the decision wholly upon the statute of congress. Mr. Justice Ross said: "The principle of prior appropriation of water on the public lands in California, where its artificial use for agricultural, mining, and other like purposes is absolutely essential, which has all along been recognized and sanctioned by the local customs, laws, and decisions, was thus expressly recognized and sanctioned by the supreme court of the United States, and also by the act of congress of 1866." The same policy, he continues, led to the further act of 1870, previously quoted. "The defendant's grantors, therefore, had the right to appropriate the water in controversy, and, if they acquired a vested right therein prior to the issuance of the plaintiff's patent, the plaintiff's rights, by express statutory enactment, are subject to the rights of the defendant."²

¹In support of this conclusion the following cases were cited: *Megerle v. Ashe*, 33 Cal. 74; *Daniels v. Lansdale*, 43 Cal. 41; *Smith v. Athern*, 34 Cal. 507; *Lansdale v. Daniels*, 100 U. S. 118.

²[This doctrine is now conclusively established upon the authorities. In a later case the same court said: "Whoever purchases land from the United States or this state after the whole or some part of the water of a natural water-course running through such land has been appropriated by some one else under the act of congress of

July 26, 1866, or under the provisions of title 8 of the Civil Code of this state, takes subject to the rights acquired by such prior appropriator." *Lux v. Haggin*, (Cal.) 4 Pac. Rep. 924. See, also, *Barnes v. Sabron*, 10 Nev. 217; *Lytle Creek Water Co. v. Perdew*, (Cal.) 2 Pac. Rep. 732; *Judkins v. Elliott*, (Cal.) 12 Pac. Rep. 116. When one obtains government land, he has a right to appropriate, for the purpose of irrigation and stock-raising, the waters of any stream flowing through government land, which have not been previously

§ 27. Views of United States supreme court.

In the case of *Broder v. Natoma Water Co.*,¹ the supreme court seems to have held, or at least to have intimated by the course of its reasoning, that the subsequent grantee from the government would take subject to the rights of the prior appropriator, even in the absence of the express declaration contained in the act of 1870. A person had made a prior appropriation from the water of a stream running through a portion of the public domain included in a tract of the public land, which was afterwards, and before the statute of 1870, granted by congress to a railroad company. As between this appropriator and a subsequent purchaser from the railroad company of another parcel on the same stream, it was held that such purchaser took his title subject to the prior appropriation, because the congressional grant to the railroad company was expressly declared to be subject to all "lawful claims." Although this provision in the grant to the railroad was similar in its import to the more comprehensive statute of 1870, yet the reasoning of the court is largely based upon the rights of the appropriator of water acquired through the operation of local customs, and recognized and protected by the earlier legislation of 1866. The established doctrine of the court was said to be that the "rights of miners who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and

appropriated by another, and in waters thus converted to his use he acquires a vested right which cannot be affected by those who purchase above or below him. *Kaler v. Campbell*, 13 Or. 596, s. c. 11 Pac. Rep. 301. And where an appropriator of water leads his ditch through the public lands, he, by the construction of his ditch and

the appropriation and use of the water, acquires, as against a subsequent purchaser from the United States as complete and perfect a right to maintain his ditch as though such easement had vested in him by grant. *Ware v. Walker*, (Cal.) 12 Pac. Rep. 475.]

¹101 U. S. 274.

ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866."

§ 28. The act of 1870 is declaratory only.

Where a private person can thus acquire a right of property in the water of a public stream, or, if not an absolute right of *property*, at least a right in the nature of an easement or servitude to use the water, which is good against the United States, as proprietor of the remaining tract of land through which the stream flows, it would seem to follow, as a necessary result of the common-law doctrines concerning the devolution of title, that the same right would remain good and attached to the stream, as against any and all subsequent proprietors who may acquire title from and under the government to all or to any part of the public lands bordering upon, adjacent to, or situated near the same stream. In other words, it would seem that the statute of 1870 should be construed as simply declaratory of a familiar legal doctrine, and not as circumscribing or restricting such doctrine. If the language of such statute be found to be too narrow or incomplete to afford, of itself, a sufficient protection to the claims of prior appropriators against subsequent owners, then the courts may fall back, if necessary, upon the broader principles of the common law. In this connection, it will be important to determine who are grantees or owners acquiring title from and under the United States. While the statute should be liberally construed in favor of the prior appropriators, it should also be fairly and equitably interpreted in ascertaining who are the grantees and owners holding title to the public domain under the government. The discussion of this

question belongs, however, to a subsequent portion of our essay.¹

§ 29. Public lands of the state.

The rules thus far considered are avowedly confined in their operation to the public lands of the United States. The first contemplates an appropriation from the water of a stream or lake while it lies wholly in the public domain, before any titles of tracts adjacent to it have been acquired by other persons. The second renders a prior appropriation, thus made, valid and effectual as against private persons who subsequently acquire, from the general government, titles to portions of the public land bordering on the same lake or stream. The question is at once presented whether the same rules apply to the public lands of the state, as well as to those of the United States. The United States has, through congressional legislation, donated to individual states—to California, for example—large tracts of the original public domain, under the name of “tide-water,” “swamp,” and “overflowed” lands. Over such lands the state has, of

¹ [At the same time it must be remembered that a grant of public land of the United States carries with it the common-law rights to an innavigable stream thereon, unless the waters are expressly or impliedly reserved by the terms of the patent, or of the statute granting the land, or unless they are reserved by the congressional legislation authorizing the patent or other muniment of title. To this point the supreme court of California speaks as follows: “And if the United States since the date of the admission of the state has been the owner of the innavigable streams on its lands, and of the

subjacent soils, grants of its lands must be held to carry with them the appropriate common-law use of the waters of the innavigable streams thereon, except where the flowing waters have been *reserved* from the grant. To hold otherwise would be to hold, not only that the lands of the United States are not taxable, and that the primary disposal of them is beyond state interference, but that the United States, as a riparian owner within the state, has other and different rights than other riparian owners, including its own grantees.” *Lux v. Haggin*, (Cal.) 10 Pac. Rep. 722.]

course, both the proprietary rights of an owner, and the governmental rights of a political sovereign; while over its public lands within the territory of a state the United States has only the rights of a proprietor. If a stream was wholly situated on such public lands of California, and an appropriation should be made of its waters for irrigating, agricultural, or manufacturing purposes, before any other private persons had acquired title to tracts bordering upon its banks, would this prior appropriation be valid against the state, and also against other riparian proprietors holding titles subsequently obtained from the state? This is an important question, but its discussion will be more appropriate in connection with subsequent topics. It is enough now to say that the considerations which led to the adoption of the rules previously laid down concerning the public lands of the United States would seem to apply, with at least an equal force, to the lands owned by the state. The federal government, through its congress and its courts, has avowedly carried out a policy which was inaugurated by the legislative and judicial decisions of the state. As the doctrine of prior appropriation on the public lands of the United States originated from a policy recognized, favored, and promoted by state authority, and as similar needs exist and similar reasons apply in connection with the public lands of the state, it seems to be a natural, even if not an inevitable, consequence, that the same doctrine should be extended to those lands, as against the state itself and its subsequent grantees.¹

¹[The position taken in the text is strongly supported by a very important decision lately rendered by the supreme court of California. In *Lux v. Haggin*, (Cal.) 10 Pac. Rep. 775, it is said: "The citizens of the state have never been prohibited from entering upon the public lands of the state. The courts have

always recognized a right in the prior possessor of lands of the state as against those subsequently intruding upon such possession. The same principle would protect a prior appropriator of water against a subsequent appropriator from the same stream. It is not important here to inquire whether, as

III. THE RIGHT RESTRICTED TO THE PUBLIC DOMAIN.

§ 30. Appropriation confined to public lands.

Whatever rules may be adopted by the statutes or the decisions of a particular state, with reference to the rights of riparian proprietors who have acquired titles to all the lands on the borders of a stream, before any appropriation of its waters had been made while these were lands public,—even though the state might by its statutes or decisions expressly extend the same doctrines to all such proprietors,—still the two doctrines, heretofore described as originating from the local customs of miners and sanctioned by the legislation of the state and of congress, are confined in their operation to the public domain of the United States. All extension of these doctrines to other lands and other proprietors, and all additional rules, must necessarily proceed from the states themselves.

§ 31. Jurisdiction of state and United States distinguished.

It should be observed, in this connection, that the United States government has no power whatever to prescribe for its

against a subsequent appropriation of water, a prior appropriator of land, through which the stream may run, would have the better right. It is enough to say that, as between two persons, both mere occupants of land or water on the state lands, the courts have determined controversies. The implied permission by the general government to private persons to enter upon its lands has been assumed to have been given by the state with reference to the lands of the state: and the state, for the main-

tenance of peace and good order, has protected the citizen in the acquisition and enjoyment on its lands of certain property rights obtained through possession,—perhaps the mode by which all property was originally acquired. In view of these facts, we feel justified in saying that it was the legislative intent to exclude as well the state as the United States from the protection which is extended to riparian proprietors by section 1422 of the Civil Code.”]

grantees any general rules of law concerning the use of their lands, or of the lakes and streams to which they are adjacent, binding upon its grantees of portions of the public domain situated within a state, and becoming operative after they have acquired their titles from the federal government. The power to prescribe such rules, forming a part of the law concerning real property, belongs exclusively to the jurisdiction of the states. Over its public lands situate within a state, the United States has only the rights of a proprietor, and not the legislative and governmental rights of a political sovereign. Even with respect to the navigable streams within a state, the powers of the federal government are limited, and *a fortiori* that is so with respect to streams which are innavigable. In the great case of *Pollard's Lessee v. Hagan*,¹ the authority of the United States over its public lands within a state was thus defined by the supreme court: "When Alabama was admitted into the Union, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States. Nothing remained in the United States, according to the terms of the agreement, but the public lands. And, if an express stipulation had been inserted in the agreement granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state, except in cases in which it is expressly granted. * * * In the case of *Martin v. Waddell*,² the present chief justice, in delivering the opinion of the court, said: 'When the revolution took place, the people of

¹ 3 How. 223.² 16 Pet. 410.

each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution.' To Alabama, then, belong the navigable waters, and soils under them, in controversy in this case, subject to the rights surrendered by the constitution to the United States." Recognizing the power of the United States over such navigable streams for the purpose of regulating commerce, the court adds: "The right of eminent domain over the shores and the soils under the navigable waters, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. * * *" Summing up its conclusions, the court said: "*First*, the shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the states respectively; *secondly*, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states; *thirdly*, the right of the United States to the public lands, and the power of congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

§ 32. Power of government to annex conditions to grants.

Over the public domain within a state, and the innavigable streams and lakes situated thereon, the United States has therefore only the rights of a proprietor. Undoubtedly, as held in the case of *Union Mill & Min. Co. v. Ferris*,¹ by virtue of its proprietorship, the United States has a perfect title to the public domain, and an absolute and unqualified right of disposal; and neither a state nor a territorial legislature can modify or af-

¹2 Sawy. 176, before Sawyer and Hillyer, JJ.

fect, in any manner, the right of the federal government to the *primary* disposal of the public land. Also an innavigable stream or lake, lying within the public domain, is a part and parcel of the land itself, inseparably annexed to the soil, and the use of it is an incident to the soil, and as such passes to the patentee of the soil from the United States. As the federal government, in conveying any particular portion of its public domain within a state to a particular grantee, may as proprietor annex any conditions to the conveyance, so that the title will be taken and held subject thereto, so it may, by congressional legislation, adopt any general regulations imposing any conditions or limitations upon the use of the public domain by all persons, or upon all persons who acquire title to portions of the public domain from the government, and the titles so acquired will be held by the grantees thereof subject to such conditions and limitations. Thus, congress may provide, by general statute, for a right of way over the public lands unsold, for the ditches and canals of those who have made a prior appropriation of water, and that all grantees who subsequently acquire portions of this land shall take and hold their titles subject to such existing rights of way; or that all grantees of the public lands bordering upon a stream shall take and hold their titles subject to any previously existing appropriation of its water; or that all grantees of the public lands shall take their titles subject to the local customs or laws of the state within which the lands are situated, concerning the uses of water for mining, irrigating, agriculture, and other purposes. Congress has, in fact, adopted such legislation, prescribing rules concerning the disposition of public lands, and imposing conditions or limitations upon the titles obtained by purchasers. By one section of the act of 1866, already mentioned, it is enacted:¹ "As a condition of sale, in the

¹Rev. St. U. S. § 2338.

absence of necessary legislation by congress, the local legislature of any state or territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; *and those conditions shall be fully expressed in the patent.*" The patent here spoken of is clearly that issued by the United States to the purchasers and other grantees of the public domain, and such grantees take their titles subject to easements and other similar rights held by other persons under the customs and laws of the state.¹ This power of the United States to impose conditions and limitations upon the use of the lands within a state, which were originally public, is confined to their *primary* disposal to its immediate grantees. If, therefore, the public land bordering upon a stream, and situate within a state, should all be conveyed to private persons, free from any conditions or limitations, congress would have no power to control such persons in the use of their lands or in the use of the stream upon which their lands border. The power to legislate and to prescribe rules under these circumstances belongs exclusively to the state, as a part of its supreme municipal authority over persons and property within its jurisdiction.

IV. CONFLICTING CLAIMS BETWEEN SETTLERS AND APPROPRIATORS.

§ 33. Converse of doctrine of appropriation.

It has already been shown that the prior appropriation of water wholly upon the public lands of the United States is good against subsequent grantees or patentees of tracts upon the same stream or lake deriving their titles from the federal government.² It follows, by necessary implication from this statute, as well

¹See the observations of Sawyer, J., in *Woodruff v. North Bloomfield G. M. Co.*, 9 Sawy. 441, s. c. 18 Fed. Rep. 801.

²See *ante*, §§ 25-28; Act Cong. July 9, 1870.

as on general principle, that if a person has acquired title from the United States to a tract bordering upon a stream or lake lying within the public domain, before an appropriation has been made of its waters, any subsequent appropriation of its waters, made by another person, in pursuance of the local customs or laws recognized by the legislation of the state and of congress, must be subject to such prior title, and to the riparian rights belonging to the holder thereof.¹

§ 34. When title from United States is perfected.

When does a person thus acquire a title from the United States, within the meaning of this rule, so that any subsequent appropriation of water shall be subject thereto? The legislation of congress provides for various modes of acquiring title to public lands by different classes of persons,—by ordinary actual purchasers, by pre-emptors, by homestead settlers, and the like. In all these instances the claimant is required to do certain preliminary acts,—to file a declaration or notice, to make a location, to pay the purchase price, and the like; and after all these acts have been duly performed by him, including the payment of the price, if necessary, he is entitled to receive a patent from the government, which is executed and delivered to him by the proper officer, usually after some lapse of time. In all cases these steps must be taken in respect to land which has been surveyed by the government, or else the whole proceeding is nugatory. Wherever a patent is required by the legislation, no *legal* title passes to and vests in the purchaser, occupant, or other grantee until the patent is executed and delivered; the patent

¹Union Mill & M. Co. v. Ferris, 2 Sawy. 176; Union Mill & M. Co. v. Dangberg, Id. 450; Van Sickle v.

Haines, 7 Nev. 249; and see Crandall v. Woods, 8 Cal. 136; Leigh Co. v. Independent Ditch Co., Id. 323.

alone is the final conveyance of the legal estate. If, however, the settler, pre-emptor, or purchaser has duly complied with all the requirements of the statute, including, if necessary, the payment of the purchase price, so that nothing is left to be done by him in order to entitle him to a patent, he certainly acquires an equitable estate in the tract of land,—an equitable estate which the courts will and do protect. When a person has thus done all that he is required to do, and all that he can do to perfect his title, and must await the convenience or leisure of the proper governmental official in obtaining the conveyance which clothes him with a complete legal estate, it would be in the highest degree unjust and inequitable if his rights, as a prior purchaser or grantee from the government, could be postponed, or endangered, or in any way prejudiced or affected, by a delay in the actual execution and delivery of the patent to him.

§ 35. When patentee's riparian rights vest.

We thus reach a conclusion which is in accordance with the plainest principles of equity, that the rights of a prior purchaser or grantee of public land from the government, as against any subsequent appropriator of water, become vested and perfect, *at least* from the time when he has duly performed all the statutory requirements, including, if necessary, the payment of the purchase price, which entitle him to a patent or other final conveyance or evidence of his legal title, and not merely from the time when he actually receives his patent or other final conveyance. Whether his rights are not even more extensive; whether, after he has duly performed all the statutory requirements, and has perfected his title by obtaining a patent, his rights as a prior grantee, purchaser, or owner do not relate back to the date of the first or initiative act in the whole continuous proceeding,—is another question which will be separately examined.

§ 36. Review of the authorities on this point.

The above proposition, that the prior rights of the grantee, purchaser, or private owner under the government are at least vested and complete, as against any subsequent appropriator of water, by the due performance of all the preliminary steps, including payment, which entitle him to a patent, and do not originate solely from the patent nor attach only from the date of its delivery, seems to be fully settled by the decisions. In *Union Mill & Min. Co. v. Dangberg*,¹ the court held that one who has entered a tract of the public lands, under the provisions of the statutes of congress, and has fully paid for it, and has received the certificate of purchase from the governmental official, becomes vested with the equitable title, and as such equitable owner is entitled to all the water-rights of a riparian proprietor, even though he has not yet received a patent. Also that one who has duly entered a tract of land in conformity with the requirements of the homestead act, and continues to reside thereon, becomes entitled to the water-rights held by any riparian owners. And, in general, a person who entered and paid for a tract of the public lands before the act of 1866, holds his land unaffected by that act, since his patent will relate back to the date of his entry,—the inception of his title.

In the very important case of *Van Sickle v. Haines*,² the supreme court of Nevada decided the following general propositions: As the United States has an absolute and perfect title to, and unqualified property in, the public lands; and as running water is an incident to or part of the soil over which it naturally flows,—a patent given to a private person—in the absence of any special limitations or exceptions or easements contained in the instrument itself, or created by statute—carries not only

¹2 Sawy. 450; and see *Union Mill & M. Co. v. Ferris*, 2 Sawy. 176.

²7 Nev. 249.

the unincumbered fee of the soil, but the stream naturally flowing through it, and the same rights to its use, or to recover for a diversion of it, as the United States or any other absolute owner could have. An owner of land over which a stream naturally flows has a right to the benefits which the stream affords, independently of any particular use; that is, he has an absolute and complete right to the flow of the water in its natural channel, and the right to make such use of the water, *when he chooses*, as will not damage others located on the same stream and entitled to equal rights with himself. A patent to land from the United States, in the absence of any statutory or other limitations, carries with it a natural stream running through the land as an incident thereto, together with the right to have it returned to its channel if diverted. It follows, therefore, in the absence of special legislation to the contrary, that a pre-emptioner, while occupying and improving one quarter section of the public land, has no right to enter upon another quarter section, to which he makes no claim, and divert from it a valuable stream of water for the benefit of the land which he is claiming. In regard to the general doctrine of riparian rights among the various proprietors of private lands on the borders of a stream, the court holds that the territorial statute, adopting the common law of England, was ratified and embraced by the state constitution; that the common-law doctrine as to running water allows all riparian proprietors to use it in any manner not incompatible with the rights of others, so that no one can absolutely divert all the water of a stream, but must use it in such a manner as not to injure those below him; that the early decisions of Nevada, and those of California, holding that priority of appropriation gave a right to the use of water, were made in cases where there was no title to the soil, *and have no bearing in cases where absolute title has been acquired.*

In *Leigh v. Independent Ditch Co.*¹ the complaint alleged that the plaintiffs were owners and in possession of a certain tract of mining land through which a natural stream flowed, and that defendants had diverted the waters thereof to their injury, and prayed relief. Defendants demurred to this complaint, on the ground that it did not allege any appropriation or use of the waters by the plaintiffs. The court said: "The demurrer was properly overruled. The allegation that the plaintiffs were the owners and in the possession of the mining claims [the tract of land] was sufficient. And the ownership and possession of the 'claims' draw to them the right to the use of the water flowing in the natural channel of the stream. The diversion of the water was therefore an injury to the plaintiffs, for which they could sue. The principle involved in this case was expressly decided by this court in the case of *Crandall v. Woods*.² In that case it was said: 'One who locates upon public lands, with the view of appropriating them to his own use, becomes the absolute owner thereof, as against every one but the government, and is entitled to all the privileges and incidents which

¹8 Cal. 323, (1857.)

²8 Cal. 136, (1857.) The point actually decided in this case is, of course, authoritatively settled by the later utterance of the same court made in the subsequent case, as quoted above in the text. A perusal of the opinion in *Crandall v. Woods* would leave it doubtful, to say the least, in the absence of the subsequent interpretation, whether such a point was *decided*. Some portions of the opinion seem to intimate—even if they do not expressly hold—that the mere prior *ownership* and *possession* of a tract of land upon a stream do not render the proprietor's rights to

the waters thereof perfect, or at least do not entitle him to any relief against a diversion of such waters by another person; that even the prior *owner* of the land must have made some actual appropriation of the water to his own uses, before he can maintain an action against the diversion by another person whose claim is subsequent to his own. In other words, that mere prior *ownership* of riparian lands does not confer full and perfect riparian rights to the water. See, also, to the same effect, *Nevada Co. & Sac. Canal Co. v. Kidd*, 37 Cal. 282.

appertain to the soil, subject to the single exception of rights antecedently acquired.' ”

The conclusion heretofore reached, that the rights of a prior grantee or purchaser from the United States, as against subsequent appropriators of water, must be regarded as complete and perfect, at the latest, from the time when he has fully performed all of the statutory requirements, including payment, which entitle him to a patent, and not from the time of his receiving a patent, may appear, perhaps, to conflict with the recent decision in *Osgood v. El Dorado, etc., Co.*;¹ but a careful examination of that case shows that no such conflict was intended, and none could legitimately arise upon the facts. The plaintiff relied upon the doctrine of relation, in order to carry his right back to his *first* proceedings, which were earlier than those of the defendants, and the court simply held that on the facts the doctrine of relation did not apply. The plaintiff's *first* step was taken while the lands were unsurveyed; and his earliest legitimate proceeding was subsequent to the date at which defendants' rights of appropriation accrued.

¹56 Cal. 571, 578. My reference to this decision on a previous page (*ante*, § 26) does not describe it with perfect accuracy, and needs some correction. It is true that the reporter's head-note represents the court as laying down the following general rule: "In a question of priority of right between an appropriator of water on the public lands and a pre-emptor, the rights of the latter date from the issuance of his patent." It is also true that Mr. Justice Ross says, in his opinion: "The plaintiff's rights must therefore be held to have attached on the twenty-fifth of October, 1871, the date of the issu-

ance of his patent." But this language cannot have been intended to lay down a general rule applicable to all pre-emptors; it must have referred entirely to the particular facts of that case. This plainly appears from the sentence immediately preceding, and from the cases which he cites in support of his conclusion,—these very cases recognizing the rule that a grantee's right *may* relate back to a date before that of his patent. He says: "The plaintiff seeks to invoke the doctrine of relation; but for obvious reasons no case was made for the application of that doctrine." The plaintiff took

In *Farley v. Spring Valley Min., etc., Co.*¹ the plaintiff, a pre-emptor, had settled on public lands of the United States, and filed his declaratory statement on February 27, 1871; he had proved up and paid the purchase price in 1877; and he received his patent on January 23, 1879. The defendants made an appropriation of water after 1871, but before 1877. The court held that the plaintiff's rights as a private proprietor only accrued in 1877, when he had proved up and paid the price; and he was therefore a subsequent purchaser as against a prior appropriation of the defendants. This case clearly recognizes the doctrine that the rights of a grantee or purchaser from the United States, as against another party claiming under the government, do not accrue from the time of executing and delivering his patent alone; but are complete when his equitable estate is perfected by his performing all of the requisites which entitle him to receive a patent.

The rights of the prior owner of a tract bordering on a stream, as against a subsequent appropriator of its waters upon the public domain, are impliedly, even if not expressly, recognized by

possession of his land several years before it was surveyed. It was surveyed in 1865. In June, 1868, he filed his first declaration as a pre-emptor; in 1870 he had paid up; and in 1871 he received his patent. But the defendants had taken their first step, from which their rights of appropriation arose, in March, 1867. It thus appears that, even if the plaintiff's title did relate back to the date of his declaration in 1868, it was still subsequent to defendants' right of appropriation, which accrued in 1867. The remark that plaintiff's title attached at the date of his patent was not, therefore, essential to the decision actually

made on the facts. [But a recent authority speaks of this case in the following language: "*Osgood v. Water Co.* presented a question of priority between an appropriator of water on lands of the United States and a pre-emptioner. It was there held that, by reason of the express language of the seventeenth section of the act of congress of July 9, 1870, amending the act of July 26, 1866, the rights of the pre-emption claimant, as against an appropriator, date only from his patent or certificate of purchase." *Lux v. Haggin*, (Cal.) 10 Pac. Rep. 782.]

¹ 58 Cal. 142.

other decisions. In *Gibson v. Puchta*¹ the court held that when the title of two parties to public mineral lands is based on possession alone, the older possession gives the better title as between the two, even though the elder possessor uses his land for agriculture and the younger for mining. In such a case, their rights, as against each other, depend upon the common-law doctrines applicable to adjoining land-owners. The agricultural occupant has a right to use the water for the purpose of irrigating his own land in a proper and reasonable manner, and no cause of action can arise against him for such use, even though the mining occupant may sustain some injury therefrom; he would only be liable for a negligent or willful injury done to the other occupant by means of his irrigation. What is thus true of an occupant whose title to a riparian tract of the public lands rests wholly upon a prior possession, must certainly be true of an owner whose title to such a tract rests upon a prior patent, conveyance, or other grant from the United States.

§ 37. Riparian rights protected.

In *Wixon v. Bear River, etc., Co.*² the court held that if a tract of land on the bank of a stream in the mineral regions is inclosed and appropriated for the purposes of a garden or orchard, and the water of the same stream is afterwards appropriated by another person for mining purposes, at a point above the tract, the water subsequently appropriated must be used so as not to injure the garden, orchard, or fruit trees; that one who

¹33 Cal. 310.

²24 Cal. 367; and see *Rupley v. Welch*, 23 Cal. 453; *Hill v. Smith*, 27 Cal. 476. The right of the prior occupant was here merely possessory as against the United States. An early statute of California

seems to have given miners a right to enter upon the lands of prior occupants used solely for *farming* purposes, when situated in the mineral regions; the interest of such occupants being only possessory.

incloses a tract of public land in the mineral regions, and plants it with fruit trees, acquires a vested right therein, and a subsequent appropriator must use the water for mining purposes so as not to disturb such vested right, or destroy or injure the garden or orchard.

The rights of a private owner who has obtained a full title to a tract of land bordering upon a stream have been stated by quite recent decisions of the California supreme court. "As being owners of the land, the plaintiffs have an interest in the living stream of water flowing over the land; their interest is called the 'riparian right.' Under settled principles, both of the civil and the common law, the riparian proprietor has a usufruct in the stream as it passes over his land."¹ In *Creighton v. Evans*² the same court held that the right of a riparian private owner to have the water of the stream run through his land is a vested right, and any interference with it by another person gives him a cause of action for appropriate relief; that a diversion of the water by one who is *not* a riparian proprietor on the same stream is a legal wrong to the person who is such a riparian owner; that a person who is *not* a riparian proprietor has no right to take any water from the stream, even if enough is left for the uses of the riparian owner,—even if the latter has sustained no actual damage from the diversion.

§ 38. Doctrine of relation applied to patentees.

It having been shown that the rights of a patentee from the United States, as a prior purchaser or owner, relate back at least to the time when he has duly performed all the acts, including payment, which entitle him to a patent, the question still remains whether his rights do not in fact relate back to the date of his first or initiative step in the course of proceedings pre-

¹Pope v. Kingman, 54 Cal. 3, 5. ²53 Cal. 55.

scribed by congress,—as in case of a pre-emptor, to the filing of his declaratory statement.

§ 39. Grounds for the application of this doctrine.

This question arises in the construction and application of general statutes of congress, which were intended to encourage actual settlers and occupants of the public lands, by providing a means for such actual settlers to acquire the private ownership of tracts of land, and for such actual occupants to acquire the right to divert and use the waters of streams. The same policy plainly underlies the whole system of legislation. When any conflict arises between parties seeking to avail themselves of these different statutes,—between parties seeking to acquire tracts of land under one set of statutes and parties seeking to acquire water-rights under another,—it would seem to be just and reasonable that the same principle or method of construction and interpretation should be extended to all these statutes in determining the rights of such conflicting claimants. In respect to the appropriator of water on the public lands, when he has duly posted and given the notices of his appropriation, and has followed up this initiative by proceeding to construct his ditches, dams, and other works with reasonable diligence, and without unreasonable delay, his right of appropriation, when his works are thus completed, relates back to the date of his first or preliminary act.¹ This rule seems to be fully settled. In cases of conflict as to priority of right between such appropriator of water and a patentee of land from the United States, it would seem to be just and reasonable that the same rule of interpretation should be extended to the other similar legislation of congress by which private persons are authorized to acquire title to portions of the public domain as pre-emptors, homestead occupants, and the like. Congress has given no in-

¹ See *Osgood v. El Dorado, etc., Co.*, 56 Cal. 571.

timation of a policy more favorable to the use of water on the public domain than to the use of the public lands for all other beneficial purposes. In the absence of decisions, it would naturally be supposed that the same rule should be applied to all persons who acquire rights under this system of legislation, in determining any conflict which may arise between them.

§ 40. California decisions.

The decisions dealing or appearing to deal directly with this question are very few. In California the rule is settled *against* the claims of a pre-emptor who has received his patent from the United States, so far as it can be put at rest by one decision. In *Farley v. Spring Valley M. & I. Co.*,¹ the plaintiff, a pre-emptor, settled on government land; filed his declaratory statement February 27, 1871; proved up and paid in 1877; and obtained his patent January 23, 1879. The defendants made an appropriation of water which began after 1871, but before 1877. The plaintiff's right was held to have begun only in 1877, when he had "proved up and paid," and he was therefore a subsequent purchaser to the defendant. This decision was rested upon the following grounds: The public land belonged to the United States until the plaintiff had proved up and paid in 1877. Until that time congress had full power to withdraw the land from sale, and to sell or grant it to another. Certain cases were cited as expressly sustaining these conclusions.²

§ 41. Review of the cases.

With great respect for the able court which rendered this decision, and deference to its learning and ability in all questions

¹58 Cal. 142.

²Namely, *Frisbie v. Whitney*, 9 Wall. 187; *Hutton v. Frisbie*, 37 Cal. 475; *Western Pac. R. R. v. Te-*

vis, 41 Cal. 489. The court also held that under the acts of congress, July 26, 1866, and July 9, 1870, the defendants obtained "existing

connected with governmental land titles, I think that the matters actually decided in *Frisbie v. Whitney*, *Hutton v. Frisbie*, and *Western Pac. R. R. v. Tevis* do not sustain the conclusion which they reached in *Farley v. Spring Valley M. & I. Co.*; that a careful examination of these prior cases will show that they dealt with an entirely different state of facts, and an entirely different kind of legislation; and that the opinions in these cases avowedly and carefully except and exclude from their operation such questions as that of priority of right between a pre-emptor and an appropriator of water, arising under the general statutes of congress concerning the disposition of the public lands among private proprietors or occupants. In order to understand the exact points decided by the United States supreme court in *Frisbie v. Whitney*, and the character of the legislation to which it relates, a brief statement of the material facts is necessary. A certain person, whom I will designate as A., held a Mexican grant to a large tract of land in California. This grant was for years supposed to be perfectly valid, and A.'s title as perfectly good. He had from time to time sold and conveyed portions of it to divers purchasers, who had for years held possession of their farms, inclosed them, built on them, planted orchards, and otherwise improved them, under the supposition that the titles obtained from A. were valid. At length the supreme court of the United States decided that the grant to A. was null and void, and the land included in such grant was therefore the public domain of the United States, subject to all of the general statutes of congress concerning the public domain. Immediately upon the rendition of this decision, a great number of persons rushed onto

rights" to construct and use their reservoir, which were excepted and saved in the patent issued to the plaintiff; citing *Jennison v. Kirk*, 98 U. S. 460; *Broder v. Natoma, etc., Co.*, 50 Cal. 621. Of

course the real question was whether the defendants had any such "existing rights" at the time when the right of the plaintiff first accrued and became vested *as against the defendants*.

the tract, and, disregarding the rights of the prior occupants, proceeded to locate claims as pre-emptors upon it, upon the improved and cultivated and occupied portions, to file their declaratory statements, and to take the other steps necessary, under the general statutes, in order to secure their titles as pre-emptors of the public lands. This proceeding was a palpable wrong to the *bona fide* and innocent occupants who were thus dispossessed. In this condition of facts, congress interfered, after the pre-emptors had filed their declaratory statements, but before they had paid the price so as to be entitled to patents, and by a special statute, applicable to the lands included in A.'s grant, withdrew those lands, or at least such portions of them as had been sold to *bona fide* purchasers, from sale or pre-emption under the general statutes, and confirmed and established the rights and titles of such prior *bona fide* purchasers holding under A.'s grant, as against the claims of the pre-emptors who had located tracts and filed declarations, but had not yet proved up and paid. A controversy arose concerning the ownership of a certain tract between a pre-emptor and a prior purchaser and occupant under A.'s grant, which the supreme court of the United States finally decided in the case of *Frisbie v. Whitney*.¹ As the reporter's head-note accurately describes the questions passed upon by the court, it will be sufficient to quote it, without giving more elaborate extracts from the opinion. It will be seen that all the equities were strongly in favor of the prior occupants and against the pre-emptors. The head-note is as follows: "Occupation and improvement on the public lands, with a view to pre-emption, do not confer a *vested right* in the land so occupied, [*i. e.*, as the rest of the case plainly shows, a vested right against the United States.] It *does* confer a preference over others in the purchase of such land by the *bona fide* settler, which will enable

¹9 Wall. 187.

him to protect his possession against other individuals, and which the land-officers are bound to respect. This inchoate right may be protected by the courts against the claims of other persons who have not an equal or superior right, but it is not valid against the United States. The power of congress over the public lands, as conferred by the constitution, can only be restrained by the courts, in cases where the land has ceased to be government property by reason of a right vested in some person or corporation. Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land-officer given to the purchaser. Until this is done, it is within the legal and constitutional competency of congress to *withdraw the land from entry or sale, though this may defeat the imperfect right of the settler.*" The case of *Hutton v. Frisbie*¹ was an exactly similar controversy, growing out of the very same transaction, involving exactly the same questions, which the supreme court of California decided in the same manner. In *Western Pac. R. R. v. Tevis*² the court held, for the same reasons, that congress has power, by a special statute giving the right of way over the public lands of the United States to a railroad company, to include within such statutory grant, and thus convey to the railroad, portions of the public lands which pre-emptors had previously entered, located, and claimed, under the pre-emption laws, but for which they had not yet paid and received certificates of purchase.

It is plain that the courts do not intend, in these three cases, to touch upon the question, to what period or stage of his preliminary proceedings does the right of a pre-emptor, (or other purchaser,) *after he has received his patent*, relate back, in a contest as to priority with another person claiming title under the general legislation of congress? These cases simply hold that a

¹37 Cal. 475.

²41 Cal. 489.

pre-emptor who has merely located a tract of the public land, occupied it, and filed the preliminary declaration, but has not yet paid the price, obtains no vested right therein against the United States; and that congress may, therefore, by some special statute exercise *its* continuing rights of ownership over such tract, withdraw it from entry, location, settlement, or sale under the operation of the general legislation, and may sell or donate or grant such tract to another person, without regard to the inchoate and imperfect right to it of the pre-emptor. The conflicting rights of two persons claiming under different provisions of the *general* statutes of congress concerning the acquisition of private titles or interests in the public lands,—general statutes which were dictated by and carry out the same liberal policy,—present, in my opinion, another question, which, I would most respectfully but earnestly submit, is not embraced within nor passed upon by the three decisions above described, and which were cited and relied upon in *Farley v. Spring Valley M. & I. Co.*¹ Those cases deal with the interest of a pre-emptor before he obtains a patent, and before he has paid the price, not with his interest *by relation* after the patent is delivered. Even *that* inchoate interest is not a mere nullity. While it is not, in its imperfect condition, a perfect and vested right to the land as against the United States, the supreme court pronounces it to be an existing right which the courts will protect against third persons who have no superior or equal claims. When are the claims of third persons, derived from other portions of the *general* system of legislation concerning the acquisition of private ownership in the public lands, superior or equal to the inchoate right of the pre-emptor? It seems to me that *this* question is carefully distinguished by the decisions above quoted, and excepted from their operation; that those decisions are con-

¹58 Cal. 142.

fined to a special act of congress directly *withdrawing* specific portions of the public lands from the operation of such general legislation as the pre-emption laws, and do not touch upon the effect of the *general* statutes dealing with the public lands, and prescribing the modes by which private titles or interests therein may be acquired.

In *Hutton v. Frisbie*, a case which arose on the same facts, Chief Justice Sawyer, delivering the opinion of the court, said:¹ "Nor do we question the rule adopted in *Chotard v. Pope*² and *Lytle v. State*,³ to the effect that when a party is authorized by an act of congress *generally* to enter 'in any land-office,' etc., 'a quantity of land not exceeding,' etc., he must be limited in his selection to lands subject to selection, and cannot take lands already sold, or reserved from sale, or upon which a pre-emption, or some other right, has attached under a law *which is still in force*, and which covers and protects it. The rule is obviously sound. It cannot for a moment be supposed that congress, by *such general acts*, contemplated that the party should be authorized to take land upon which other parties had already entered and taken steps to acquire it, and were diligently pursuing their rights under acts *still in force* with reference to that land, or that it intended in this *general* way to repeal such acts. The two acts in such cases are not necessarily inconsistent, and can be so construed in the mode adopted by the court as to stand together; and in such cases it is obviously the duty of the court so to construe them. But such is not the case with the act we are now considering." Again: "The policy of the pre-emption laws was undoubtedly beneficent. They were intended to give those who were pioneers in the unsettled wilds of the public domain the first right to purchase the unoccupied lands which they have had the courage and hardihood to settle, and it *will*

¹37 Cal. 475, 485, 486.

²12 Wheat. 587.

³9 How. 333.

always be our pleasure as well as duty to extend to all such the utmost protection justified by the laws of the land. But this beneficent policy has no element in harmony with the principle that impelled men to rush in upon the improved possessions, and avail themselves of the labor of their neighbors, under the condition of things connected with the Suscol *rancho*, [*i. e.*, the grant to A.] The equities which lay at the foundation of the pre-emption policy were, in this particular instance, not with those who entered upon the possessions of such of their neighbors as were honest purchasers; but they were all, and even equities of a much higher obligation, with the purchasers in good faith, who were not merely pioneers, but also parties who had paid for their lands, and long occupied and improved them, under the belief that they had a good title; and congress hastened to recognize and give effect to those equities by passing the act in question." Again, the same able judge says: "The difference between this case and those of *Chotard v. Pope* and *Lytle v. State*, where the parties were entitled to select lands from a much larger portion of the public domain, is so obvious that argument can scarcely make it appear more plain. Where an act authorizes a party to enter any thousand acres of land he may select within specified exterior boundaries containing one hundred thousand acres, or in a whole state, and it happens that the government has already sold a given tract within said boundaries, or a pre-emption right in favor of another party has already attached to said particular tract under some prior law, it is not for a moment to be supposed that it was intended to permit an entry of the tract of land so sold; *or upon which such prior right had already attached.* But if he is authorized in express terms to enter the very same specific tract, and no other, before sold or upon which the pre-emption right had attached, there can be no doubt as to the intent to allow the entry of that specific tract, whether it was in the power of congress to give effect to

that intent or not. And that is just the difference between the cases cited and the one under consideration." The opinion of Mr. Justice Clifford in *Frisbie v. Whitney*¹ contains explanatory and limiting language to the same general effect.

It would seem that language could not be more plain and pointed than that of the foregoing extracts, to show that the decisions in *Hutton v. Frisbie* and *Frisbie v. Whitney* were confined to the operation of special legislation dealing with specified portions of the public domain, and had no reference whatever to the effect of the *general* statutes of congress forming parts of the same general system, nor to the conflicting rights of priority between two parties claiming under the different and *co-existing* provisions of these general statutes. The decision in the case of *Western Pac. R. R. v. Tevis*² was also based upon upon special legislation of exactly the same character.

Where A. duly locates and settles upon a surveyed tract of the public land bordering upon a stream, and files his declaratory statement in (say) 1874, duly completes the requirements of the statute and pays the price in 1877, and receives his patent from the government in 1879; and B. duly posts and serves the notices of his appropriation of the water of the same stream in 1875, and proceeds with reasonable diligence to construct his dams, ditches, and other necessary works, which are not completed, however, so that he can begin the *actual use* of the water until 1880,—the appropriation of water by B., it is held, relates back to the time of his preliminary act of posting and giving notice in 1875, so that he is legally in the same position as though his actual use of the water had begun at that time; while it is said that the right of A. as a patentee shall only relate back to the time when he had paid up, in 1877. And thus, although A.'s initial step was made before any act

¹9 Wall. 187.

²41 Cal. 489.

whatever done by B., and his legal title was perfected by patent before B.'s works were completed, and the actual use of the water began, yet A.'s rights as a riparian owner on the stream are said to be subsequent to those of B. to appropriate perhaps the entire waters of the stream. In my opinion, there is nothing in the decisions of the United States supreme court, nor in those of the California supreme court, prior to the case of *Farley v. Spring Valley M. & I. Co.*, which necessarily establishes or tends to establish for the pre-emptor, or other grantee of the United States, a rule so different from that which governs the appropriator of water; and there is nothing in the general statutes of congress, nor in the policy which underlies the system, which requires such a discrimination between the two classes of claimants. The notices posted and given by the appropriator of water clearly do not confer on him any higher equity as a *bona fide* purchaser; since the actual and continuous possession required of the pre-emptor is a notice of his prior claim,—a notice of the very highest character. I have dwelt upon this particular topic at such length because the subject seemed to be one of practical importance; the discrimination against the pre-emptor or other private grantee of the United States seemed to be inequitable; the decisions bearing upon it are very few; and possibly the court may be called upon to re-examine the question in some subsequent case.

§ 42. Riparian rights under Mexican grants.

What are the rights of a private riparian proprietor, who obtains his title by a grant from the Mexican government, guaranteed and protected by the treaty between the United States and Mexico, and finally confirmed to him in the proceedings authorized by congress for the purpose of carrying into effect the stipulations of that treaty? We see no reason why the riparian rights of such a riparian proprietor should differ in any respect

from those held by any other riparian proprietor who derives his title immediately or mediately from the United States by patent or otherwise. All the doctrines and rules of the law which define and regulate the water-rights of private riparian proprietors upon *innavigable* streams at least, even if not upon navigable streams, belong entirely and exclusively to the jurisdiction and domain of state legislation. Congress has no power to interfere directly or indirectly with matters of this kind; any attempt of congress to control them by legislation would be wholly nugatory. The stipulations of the treaty with Mexico simply referred to, operated upon, and protected the *titles* of those private proprietors who held tracts of land, within the territory ceded to the United States, under grants from the Mexican government. These stipulations say in substance that such actual and *bona fide* grantees shall continue to be owners of their respective tracts, although the territory has passed into the domain of the United States; and that their right of ownership shall be respected by the United States government.

The legislation of congress, and the judicial proceedings instituted under it, were intended to carry into effect these treaty stipulations, and they operate solely upon the titles, by declaring, confirming, and establishing the private ownership of the grantees as derived from the Mexican government, the original sovereign proprietor. The treaty, and the legislation of congress which carries it into effect, are of course binding, not only upon the federal government, but also upon the governments of all the states which have been established within the ceded territory, and within whose boundaries the granted lands are situated. The treaty with Mexico, while thus securing to the private proprietors the *title* and *ownership* of the tracts of land which had been granted to them by Mexico, did not attempt to provide that this ownership should be governed and controlled by the rules of the Mexican law, nor by any other rules of law dif-

ferent from those which would govern and control all private ownership of land within the territorial jurisdiction of the United States, or within the jurisdiction of any particular states. Even if the treaty with Mexico had expressly stipulated, not only that the *titles* of private persons holding under Mexican grants should be protected and should continue to be valid and perfect, but also that the ownership of such lands, when situated on the banks of streams, should be governed and regulated by the rules of the Mexican law concerning water and other riparian rights, such a stipulation would be completely inoperative and void as soon as the territory embracing these granted lands was organized into a state; the whole subject-matter would belong exclusively to the jurisdiction of the state; the rules concerning riparian rights would fall exclusively within the domain of the state municipal law,—whether that law adopted the common-law doctrines, or promulgated other rules in the form of statutes.¹ It seems plain, therefore, that the riparian rights of a private proprietor holding by a Mexican grant duly confirmed are exactly the same, governed by the same rules, as those held and enjoyed by any other private riparian proprietor within the state. The *source* of his *title* can make no difference as to the rights of property which accompany and flow from his ownership. The question of priority between such a grantee and a person who has appropriated the waters of the stream before his grant was confirmed by the United States authorities, must depend, we apprehend, upon the legal effect given to the confirmation. Does the confirmation relate back to the date of the treaty, so that

¹This principle, and the authorities which support it, are discussed by Sawyer, J., in *Woodruff v. North Bloomfield, etc., Co.*, 9 Sawy. 441, s. c. 18 Fed. Rep. 801. The same principle is discussed by

Mr. Justice Field in delivering the opinion of the court in the case of *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, s. c. 4 Sup. Ct. Rep. 663.

the grantee is regarded as deriving his title directly and holding it continuously from the Mexican government; or does the confirmation operate only from its own date, so that the grantee is regarded as deriving and holding his title immediately and directly from the United States, in pursuance of an executory agreement made with Mexico? This question we shall not examine.

§ 43. Summary of conclusions.

The conclusions from the foregoing discussion may be briefly summed up as follows: While a natural stream or lake is situated on the public lands of the United States, within the limits of a state, a person may, under the customs and laws of a state, and the legislation of congress, acquire by prior appropriation the right to use the waters thereof for mining, agricultural, and other beneficial purposes, and to construct and maintain ditches and reservoirs over and upon the public land; which right, although merely possessory, is good against all other private persons, and is made by statute good as against the United States and its subsequent grantees.

When such a right has been acquired in this manner by prior appropriation, subsequent grantees of tracts of the public domain bordering on the same stream or lake—pre-emptors, homestead settlers, and all other purchasers—take and hold their titles subject thereto, and the patents issued to them by the United States government must expressly except or reserve all such “existing rights” so acquired by other persons in pursuance of the customs and laws of the state. The right thus excepted or reserved in a patent must, of course, be an “existing right” already acquired by some other person. When a grantee of the United States obtains title to a tract of the public land bordering upon a stream, the waters of which have not hitherto been

appropriated, his patent is not subject to any possible appropriation which may be subsequently made by another party.¹

These rules, founded upon local customs and laws, and ratified by congressional legislation, are confined in their operation to the public domain of the United States.² If tracts of public land bordering on a stream, and situated within a state, have come into the private ownership of purchasers or grantees from the United States before any appropriation has been made of the water, their rights as riparian proprietors must be determined and regulated wholly by the municipal law of the state concerning that subject-matter, over which congress has no power whatever to legislate.

Whenever a private person, as pre-emptor, homestead settler, or other purchaser or grantee, has acquired title from the United States to a tract of the public land bordering upon a stream or lake within a state, any subsequent appropriation of the waters thereof by another party is subject to his prior rights as a riparian proprietor, whatever those rights may be under the municipal law of the state; and, as against such subsequent appropriator, his rights as riparian proprietor are complete, at least

¹[When there is nothing in the record to show the contrary, it must be presumed that the lands through which the stream flowed were public lands, and had not passed into private ownership at the time of the appropriation. *Lytle Creek Water Co. v. Perdew*, (Cal.) 2 Pac. Rep. 732. Parties being in the actual possession and use of a water privilege have a good *prima facie* right to it; but, when other parties prove a prior possession and use, they overcome this *prima facie* case. *Humphreys v. McCall*, 9 Cal. 59.]

²See *Lobdell v. Simpson*, 2 Nev. 274; *Lobdell v. Hall*, 3 Nev. 507; *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534; *Robinson v. Imperial Silver M. Co.*, 5 Nev. 44; *Covington v. Becker*, Id. 281; *Hobart v. Ford*, 6 Nev. 77; *Van Sickle v. Haines*, 7 Nev. 249; *Barnes v. Sabron*, 10 Nev. 217; *Shoemaker v. Hatch*, 13 Nev. 261; *Dick v. Caldwell*, 14 Nev. 167; *Strait v. Brown*, 16 Nev. 317; *Cramer v. Randall*, 2 Utah, 248; *Munro v. Ivie*, Id. 535; *Fabian v. Collins*, 3 Mont. 215; *Burkley v. Tieleke*, 2 Mont. 59; *Caruthers v. Pemberton*, 1 Mont. 111; and other cases previously cited.

from the time when he has duly performed all of the statutory requirements, including payment of the purchase price, if necessary, so as to entitle him to a patent, and not merely from the time of issuing a patent; even if his rights do not relate back to the initiative act of the continuous proceeding by which his title is finally perfected.

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CHAPTER IV.

HOW AN APPROPRIATION IS EFFECTED.

- § 44. Successive appropriations.
- 45. Doctrines which control the appropriation.
- 46. The methods by which an appropriation is effected.
- 47. Intent to apply water to beneficial use.
- 48. There must be actual diversion.
- 49. There must be actual use of water.
- 50. Physical acts constituting appropriation.
- 51. Notice of intent to appropriate.
- 52. Reasonable diligence in completion of **works**.
- 53. When appropriation is complete.
- 54. Appropriation relates back to first step.

§ 44. Successive appropriations.

Having thus described the appropriation of waters from natural streams and lakes on the public domain of the United States, I shall proceed to consider the special doctrines which regulate such appropriation, and define the rights of appropriators. It may be stated as a general proposition, in this connection, that, when there have been several successive appropriations of water from the same stream, each appropriator stands in the position and has the rights of a *prior* appropriator towards all others whose rights have been acquired subsequently to his own. The term "prior appropriator" does not, therefore, always mean the person who is absolutely the first to obtain an exclusive right to the water of a particular stream.

§ 45. Doctrines which control the appropriation.

The most important practical doctrines embraced under this head may be regarded as having been definitely settled by numerous decisions; and they are substantially the same in all the Pacific states and territories where this theory of a prior exclu-

sive appropriation of water prevails. The various topics to which these doctrines relate, and which require any discussion, are the following: The methods by which an appropriation is effected; the time from which the rights under an appropriation become vested; the property and other rights in general of the prior appropriator; the amount of water embraced in an appropriation, or the extent of the appropriation; subsequent appropriation, and the relations between successive appropriators of the same stream; abandonment of a prior appropriation. I purpose to treat of these matters in the order here given.

§ 46. The methods by which an appropriation is effected.

It should be carefully observed that the water-right now under discussion may be, in its essential nature, merely a possessory right. Its acquisition and maintenance are not essential incidents of, and do not necessarily depend upon, a legal title to any portion of the public lands held by the appropriator under a patent or other conveyance from the government.¹ Nor is it necessary that the appropriator should have located or taken possession of any tract or parcel of the public domain bordering upon the stream or lake from which the appropriation is made. The tract or claim which he possesses, and on or at which the water is actually used, may be at a distance from such stream or

¹ ["One who locates upon public lands with a view of appropriating them to his own use becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. He may admit that he is not the owner in fee, but his possession will be sufficient to protect

him as against trespassers. If he admits, however, that he is not the owner of the soil, and the fact is established that he acquired his rights subsequent to those of others, then, as both rest for their foundation upon appropriation, the subsequent locator must take subject to the rights of the former, and the rule, *qui prior est in tempore potior est in jure*, must apply." *Crandall v. Woods*, 8 Cal. 143.]

lake, and the very object of his appropriation may be to conduct the water from the stream, through a ditch or canal across the intervening *public* lands, to the tract which he possesses as a mining claim, a farm, or a mill; or even to sell and dispose of the water, thus conducted through the canal, to other parties, who use it for like purposes on their own "claims" or tracts of land. The true "riparian rights" belonging to "riparian proprietors," by virtue of their actual ownership of lands bordering upon a stream, will be considered hereafter; they are foreign to the present discussion.

§ 47. Intent to apply water to beneficial use.

In order to make a valid appropriation of waters upon the public domain, and to obtain an exclusive right to the water thereby, the fundamental doctrine is well settled that the appropriation must be made with a *bona fide* present design or intention of applying the water to some immediate useful or beneficial purpose, or in present *bona fide* contemplation of a future application of it to such a purpose, by the parties thus appropriating or claiming. The purpose may be mining, milling, manufacturing, irrigating, agricultural, horticultural, domestic, or otherwise; but there must be some such actual, *positive*, beneficial purpose, existing at the time, or contemplated in the future, as the object for which the water is to be utilized; otherwise no prior and exclusive right to the water can be acquired, no matter how elaborate and complete may be the physical structures by which the attempted appropriation is effected.¹

¹Weaver v. Eureka Lake Co., 15 Cal. 271; Maeris v. Bicknell, 7 Cal. 261; Davis v. Gale, 32 Cal. 26; McKinney v. Smith, 21 Cal. 374; Ortman v. Dixon, 13 Cal. 33; McDonald v. Bear River, etc., Co., Id. 220; McDonald v. Askew, 29 Cal. 200;

Gibson v. Puchta, 33 Cal. 310; Dick v. Caldwell, 14 Nev. 167; Dick v. Bird, Id. 161; Cramer v. Randall, 2 Utah, 248; Munro v. Ivie, Id. 535; Woolman v. Garringer, 1 Mont 535.

Under this rule, an appropriation for mere purposes of speculation is nugatory.¹ And a diversion of water solely for the object of drainage, without any *bona fide* intention of its present or future use for other beneficial purposes, does not constitute a valid appropriation.² Thus, in the first of the cases cited below, the grantors of the plaintiffs had constructed a ditch for the purpose of drainage alone, with no intention of appropriating the water to any other use, and the defendants had subsequently made a ditch leading from the same stream with the intent of using the water thus diverted for a beneficial object. The court held that the defendants, although later in time, had gained a priority of appropriation over the plaintiff's grantors, and over all persons holding under them.

§ 48. There must be actual diversion.

Again, since no exclusive *property* is or can be acquired in the water while still remaining or flowing in its natural condition, distinct and separate from the property in the land over which it runs,³ it follows, as a second indispensable requisite of the appropriation under consideration, that there must be an actual diversion of the water from its natural channel or bed, by means of a ditch, canal, reservoir, or other structure.⁴ For this purpose, however, a dry ravine or gulch may be used as a part of a ditch, with the same effect as though the structure were wholly artificial;⁵ and a "flume" is in all legal respects the same as a

¹Weaver v. Eureka Lake Co., 15 Cal. 271.

²Maeris v. Bicknell, 7 Cal. 261; McKinney v. Smith, 21 Cal. 374; Thomas v. Guiraud, 6 Colo. 530.

³Parks Canal & M. Co. v. Hoyt, 57 Cal. 44; Kidd v. Laird, 15 Cal. 162.

⁴Dalton v. Bowker, 8 Nev. 190.

⁵Hoffman v. Stone, 7 Cal. 46. [Where plaintiff built a ditch upon

public and unoccupied land, which conducted water to a point in a canyon, where it disappeared under ground, coming to the surface again at the mouth of the canyon, *held*, that he was entitled to be protected as against defendant, who dug other ditches cutting off the supply. Keeney v. Carillo, 2 N. M. 480.]

ditch or canal.¹ Not only may the appropriator use another natural ravine as a part of his ditch for conducting the water which has been diverted; he may even use a lower portion of the same natural channel from which the water was taken, for a like purpose. If, after diverting and using the water, the appropriator returns it into its original natural channel, without any intent to "recapture" it, then, as will be shown hereafter, he abandons it. But after duly diverting the water at some point, he may turn it back into the natural channel of the stream at a lower point, with the design of using a certain portion of such channel as a ditch, and of "recapturing" the water, and may then divert the same quantity originally appropriated at a point still lower down the stream.²

§ 49. There must be actual use of water.

[One of the essential elements of a valid appropriation of water is the actual *application* of it to some useful industry. This must follow and consummate the intention. To acquire a right to water from the diversion thereof, one must, within a reasonable time, employ the same in the business for which the appropriation is made. What shall constitute such reasonable time is a question of fact, (as will appear more fully hereafter,) depending upon the circumstances connected with each particular case.³]

¹Ellison v. Jackson Water Co., 12 Cal. 542.

²Richardson v. Kier, 37 Cal. 263; Butte Canal, etc., Co. v. Vaughn, 11 Cal. 143.

³Sieber v. Frink, 7 Colo. 148, s. c. 2 Pac. Rep. 901. [In Colorado, the first appropriator of water from a natural stream for a beneficial purpose has a right to the extent of his appropriation, (subject only to the qualifications contained in the

Colorado constitution,) paramount to the right acquired by a subsequent patentee of the land. This right is not dependent upon the *locus* of the application of the water to the beneficial use. Nothing in the statutes is susceptible of a construction which would vary this rule. Coffin v. Left-Hand Ditch Co., 6 Colo. 443; Thomas v. Guiraud, Id. 530.]

§ 50. Physical acts constituting appropriation.

The fundamental doctrine is well settled that, in order to constitute a valid appropriation of the kind under consideration, two distinct elements are absolutely essential,—the intent to appropriate water from a particular stream, and physical acts by which this intent is carried into effect, without abandonment, until the appropriation is completed. Either without the other is insufficient. How this intent may be signified, and what physical acts may be sufficient to carry it into operation, must depend somewhat upon the natural condition and situation of the locality, and other circumstances of the case. “In appropriating unclaimed water on the public land, only such acts are necessary, and such evidence of the appropriation required, as the nature of the case and the face of the country will admit, and are under the circumstances and at the time practicable. For example, surveys, notices, blazing of trees, followed by actual work and labor, without abandonment, will in every case, where the work is completed, give title to the water against subsequent claimants.”¹ It follows, therefore, that a notice alone of an intent to divert or to use the water of a specified stream will not of itself constitute an appropriation thereof;² nor, on the other hand, will the mere act of com-

¹Kimball v. Gearhart, 12 Cal. 27; Osgood v. El Dorado, etc., Co., 56 Cal. 571; Thompson v. Lee, 8 Cal. 275; Kelly v. Natoma W. Co., 6 Cal. 107; Weaver v. Eureka Lake Co., 15 Cal. 271; Davis v. Gale, 32 Cal. 26; Robinson v. Imperial Silver M. Co., 5 Nev. 44; Columbia M. Co. v. Holter, 1 Mont. 296. [The true test of appropriation is the successful application of the water to the beneficial use; the *method* employed is immaterial. Thomas v. Guiraud, 6 Colo. 530.

The erection of a dam across a natural water-course is an actual appropriation of the water at that point, but not below it, although the water flowing over the dam is brought back into the water-course by means of canals made by the owners of the dam. Kelly v. Natoma Water Co., 6 Cal. 105.]

²Thompson v. Lee, 8 Cal. 275; Robinson v. Imperial Silver M. Co., 5 Nev. 44; Columbia M. Co. v. Holter, 1 Mont. 296.

mencing or digging a ditch, even with the intent to appropriate, be sufficient of itself to give an exclusive right to the water of a stream, without some notice or publication of the intent.¹ "Public land is appropriated by one character of act; water, by another. The digging of a ditch on public land is not an appropriation of land sufficient for a mill-site, nor is the mere appropriation of a mill-site an appropriation of water for purposes of milling."²

§ 51. Notice of intent to appropriate.

While a notice of the intent to appropriate is essential, the mode of giving it depends upon the circumstances of the case, the nature and situation of the stream, and of the adjacent country. The usual mode seems to be by posting written or printed notices on or near the margin of the stream or lake at the point where the diversion is to be made, and perhaps at other points along the projected line of the canal.³ No particular form of notice is prescribed. All that is required is that its terms shall be sufficient to put a reasonably prudent man upon inquiry;⁴ and to this end its language must be liberally construed.⁵ If an appropriator, after duly posting a notice, and while prosecuting his work with diligence, posts a second notice of appropriation of the same water, he does not thereby abandon his claim under the former notice.⁶ After a notice of the intention to appropriate the water is given, the works by which the appropriation is to be effected must be actually commenced, and must then be prosecuted with reasonable diligence unto completion, in order to perfect the exclusive right to the

¹ Kimball v. Gearhart, 12 Cal. 27.

² Robinson v. Imperial Silver M. Co., 5 Nev. 44.

³ See Osgood v. El Dorado, etc., Co., 56 Cal. 571.

⁴ Kimball v. Gearhart, 12 Cal. 27.

⁵ Osgood v. El Dorado, etc., Co., 56 Cal. 571, 579.

⁶ Id.

use of the water which is obtained through a valid appropriation.¹

§ 52. Reasonable diligence in completion of works.

Whether the work has been begun and prosecuted with due and reasonable diligence is a question of fact for the jury, and their verdict will, in general, be conclusive.² The due and reasonable diligence in constructing the works will depend mainly upon the physical circumstances of the locality, upon the nature and condition of the region through which the ditch runs, its accessibility, the length of the season in which work is practicable, the difficulty of procuring adequate supply of labor, the extent and magnitude of the works themselves, and the like, and not upon the personal circumstances—especially the pecuniary circumstances—of the parties themselves.³ In *Ophir Silver M. Co. v. Carpenter* it was held that “diligence in the prosecution of work, such as the appropriation of running water by constructing a ditch for its use, does not require unusual or extraordinary efforts, but only such constancy and steadiness of purpose or of labor as is usual with men engaged in like enterprises, who desire a speedy accomplishment of their designs,—such assiduity in its prosecution as will manifest a *bona fide* intention to complete it within a reasonable time. In the consideration whether reasonable diligence has been exercised in the construction of a ditch necessary to the appropriation of water, requiring the outlay of much capital and the labor of many men, the illness of the appropriator and his want of pe-

¹ *Osgood v. El Dorado, etc., Co.*, 56 Cal. 571, 581; *Parke v. Kilham*, 8 Cal. 77; *Kimball v. Gearhart*, 12 Cal. 37; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534; *Woolman v. Garringer*, 1 Mont. 535.

² *Osgood v. El Dorado, etc., Co.*,

56 Cal. 571, 581; *Weaver v. Eureka Lake Co.*, 15 Cal. 271.

³ *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Parke v. Kilham*, 8 Cal. 77; *Kimball v. Gearhart*, 12 Cal. 27; *Osgood v. El Dorado, etc., Co.*, 56 Cal. 571.

cuniary means to prosecute the work, being matters *incident to the person and not to the enterprise*, are not such circumstances as will excuse great delay in the work.”¹ In *Kimball v. Gearhart* the court held: “On the question of due and reasonable diligence in constructing the works, the jury may take into consideration the circumstances surrounding the parties at the date of the appropriation, *such as* the nature and climate of the country, and the difficulty of procuring labor and materials. * * * When parties begin the construction of a ditch, who have not at the time the pecuniary means to complete it in a reasonable time, and they project the work and claim the water with full knowledge of their own lack of means, they cannot rely on such want of means as an excuse for delay, or for not prosecuting the work to completion with due diligence.” In *Parke v. Kilham*, 8 Cal. 77, it was also held that “when A. stands by and sees B. constructing a ditch at great expense, for the purpose of appropriating certain water to his own use, and does not inform B. of his own prior claim to such water, A. and his vendees are thereby estopped from afterwards setting up or asserting such claim, even though it was originally the prior one.”

§ 53. When appropriation is complete.

The appropriation does not become perfect and final until the works are completed, so that the actual use of the water has begun, or, at least, so that its actual use can be commenced. Although, as will be shown hereafter, if the works are constructed with due diligence, the appropriation relates back to the date of the initial step, during the process of their construction, in the interval between their commencement and their completion,

¹[In this case it was held that the doing of five or six days' work during a period of sixteen months, and only three months' labor during a period of two and a half years, in order to obtain an appro-

priation of running water, was *not* such diligence in prosecuting the work as would give the person doing it a superior right to the use of the water. *Ophir Silver M. Co. v. Carpenter*, 4 Nev. 534.]

the appropriator acquires no vested, exclusive right to the water of the stream, and can maintain no action against other persons for their use or diversion of the water.¹ Such right of action only arises when the works and the appropriation are completed; although, on the question of priority between the appropriator and other claimants, his appropriation then relates back to the time of his giving notice. In *Nevada Co., etc., Co. v. Kidd*² these conclusions were fully established: "A court of equity will not restrain the diversion of water until the plaintiff is in a condition to use it. While the plaintiff's dam and ditch are in the process of construction, but are not yet ready to actually appropriate or use the water, the use of the water by other persons causes no injury to the plaintiff, and gives to him no cause of action for relief, either equitable or legal. When a party claiming water is constructing a dam and ditch, until he is in a position to use the water, his right to it does not exist in such a sense as to enable him to maintain an action against another person, either to recover the water itself, or to recover damages for its diversion." The scope and effect of this decision should not be misapprehended. The case arose from an attempted or inchoate appropriation of the water of a stream on the public domain,—an appropriation of the kind sanctioned by congress and now under consideration. Although the language in some portions of the opinion is quite general, yet it should, of course, be confined to and limited by the facts of the case before the court. The rule adopted by the court is plainly confined to appropriators of water on the public lands of the United States, under the customs and laws of the state as recognized by the congressional legislation; and it has no reference

¹ [One who has by appropriation the prior right to the waters of a stream, by actually commencing and prosecuting the construction of a ditch and flume, has certainly a right to the use of so much water

as is necessary to preserve the flume from injury during construction. *Weaver v. Conger*, 10 Cal. 223.]

² 37 Cal. 282.

whatever to private owners who have obtained titles to lands on the banks of streams, nor to the "riparian rights" of such proprietors. The court clearly had no intention of holding that owners of lands bordering on a stream can maintain no action against other persons for an infringement of their "riparian rights," unless they have made an actual appropriation or use of the water by means of a completed dam, ditch, or other structure. Such a ruling would be in direct conflict with numerous *dicta* and decisions by the same court.

§ 54. Appropriation relates back to first step.

It has been shown that an appropriation does not become final and perfect until the works, by which the water is diverted so as to be actually used, are completed. When, however, the right has thus been perfected, the doctrine of *relation* may operate and determine the question of priority between the appropriator and other opposing claimants to the waters of the same stream. If a notice of the intention to appropriate was properly given, and the work of constructing the dam, ditch, reservoir, or other necessary instrumentalities of the diversion was begun within a reasonable time, and was prosecuted with due and reasonable diligence until their completion, then the exclusive right thus acquired by the perfected appropriation will relate back at least to the time of commencing the work, even if not to the time of giving the notice. If, however, the work was not prosecuted to completion with due and reasonable diligence,—in other words, if there was unreasonable delay in its prosecution,—the right of appropriation accrues and dates only from the time when the works were finally completed, and the diversion of the water actually began.¹ Both branches of the

¹Osgood v. El Dorado, etc., Co., 56 Cal. 571; Maeris v. Bicknell, 7 Cal. 261; Parke v. Kilham, 8 Cal. 77; Kimball v. Gearhart, 12 Cal. 27; Ophir Silver M. Co. v. Carpenter, 4 Nev. 534; Woolman v. Garlinger, 1 Mont. 535; Sieber v. Frink, 7 Colo. 148, s. c. 2 Pac.

rule are concisely and clearly stated in the case of *Ophir Silver M. Co. v. Carpenter*: "In the appropriation of running water for the purpose of acquiring a right thereto, if any work is necessary to be done to complete the appropriation, the law gives a reasonable time within which to do such work; and protects the rights during such time by relation to the time when *the first step was taken*. Where the work necessary to complete an appropriation of running water is not prosecuted with diligence, the right to the use of the water does not relate back to the time when the first step was taken to secure it, but dates from the time when the work is completed or the appropriation is fully perfected." What constitutes due diligence in constructing the works was discussed under the preceding head. This doctrine of relation is practically important in determining the priority of the appropriation as against subsequent appropriators and claimants of water from the same stream, and as against subsequent grantees or purchasers of lands on its banks.¹

Rep. 901; *Irwin v. Strait*, 18 Nev. 436, s. c. 4 Pac. Rep. 1215. Although the cases generally say that the right relates back to the time of *commencing the work*, there would seem to be no reason why the relation should not extend back to the time of giving the notice. The notice is the essential, initial step in one entire continuous proceeding, and the due diligence must be used from the date of giving the notice. Is it possible that the rights of another claimant could intervene between the date of the first appropriator's notice and the time when his work is actually begun, no matter how short the interval? Yet this result must be *possible* if the right of appropriation relates back only to the time of actually beginning the work.

The supreme court uses the language, "the first step was taken."

¹ [In *Irwin v. Strait*, 18 Nev. 436, s. c. 4 Pac. Rep. 1215, it is said: "In determining the question of the time when a right to water by appropriation commences, the law does not restrict the appropriator to the date of his use of the water; but, applying the doctrine of relation, fixes it as of the time when he begins the dam or ditch or flume, or other appliance by means of which the appropriation is effected, provided the enterprise is prosecuted with reasonable diligence." This language would seem to exclude the theory that the doctrine of relation would carry the appropriation back to the time of giving notice.]

CHAPTER V.

NATURE AND EXTENT OF THE RIGHT ACQUIRED BY APPROPRIATION.

I. NATURE OF THE RIGHT ACQUIRED.

- § 55. Appropriator's right begins at head of his ditch.
- 56. Nature and extent of right depends on purpose of appropriation.
- 57. Property in ditches and canals.
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I. NATURE OF THE RIGHT ACQUIRED.

§ 55. Appropriator's right begins at head of his ditch.

The doctrine is settled by repeated decisions that an appropriator who has constructed a ditch, and is thereby diverting the water of a stream, or any portion of it, for some beneficial purpose, obtains and has no property whatever in the water of such stream while it is flowing in its natural channel or bed, and before it reaches the "head" or commencement of the ditch where the diversion begins. It has even been questioned whether his right to the water after diversion, and while flowing through the ditch, is really a "property," or only an exclusive right of use; but it is settled beyond all question that he has no property in the water of a natural stream, flowing in its natural current and channel, before the diversion into his ditch or other structure takes place. He can maintain no actions based upon such property. In fact, private property in the running waters of a natural stream, flowing in its natural channel, cannot be acquired, separate and distinct from a property in the land

through and over which the stream runs.¹ In *Parks Canal & M. Co. v. Hoyt*² it was held that the water flowing in the stream above the head of the appropriator's ditch is realty, a part of the land, and does not become in any sense his property until it passes into his control in his ditch or other works. He cannot, therefore, maintain an action upon an implied contract, as for the price of personal property sold, against a person who has wrongfully diverted the water from the stream above the head of his ditch. His legal remedy for such an injury is by an action on the case to recover damages for the tort. In *Los Angeles v. Baldwin*,³ although it appeared that the city had, by prescription or otherwise, acquired the right to appropriate and use the entire water of the Los Angeles river, yet it was held that the city did not own the *corpus* of the water while flowing in the river. In *Kidd v. Laird*⁴ the general doctrine was laid down that running water, while flowing in its natural manner in the natural channel of a stream, cannot be made the subject of private ownership. A right may be acquired to the *use* of the water in such a condition, which will be protected as though it were a right of property; but this right is not a special property in the water itself,—in the *corpus* of the flowing water.

§ 56. Nature and extent of right depends on purpose of appropriation.

The nature and extent of the right acquired in the water after its diversion, while under the control of the appropriator, in his ditch, canal, reservoir, or other structure, must depend, I think, upon the purpose for which the appropriation is made.

¹*Lower Kings River W. Co. v. Kings River, etc., Co.*, 60 Cal. 408; *Parks Canal & M. Co. v. Hoyt*, 57 Cal. 44; *City of Los Angeles v. Baldwin*, 53 Cal. 469; *Nevada Co., etc., Co. v. Kidd*, 37 Cal. 282; *Mc-*

Donald v. Askew, 29 Cal. 200; *Kidd v. Laird*, 15 Cal. 161; *Ortman v. Dixon*, 13 Cal. 33.

²57 Cal. 44.

³53 Cal. 469.

⁴15 Cal. 161.

Where the appropriation is made for purpose of irrigation, or agriculture, or municipal uses, or mining, or for sale to others to be used by them in any of these modes, where the use wholly or largely *consists in the consumption*, it would seem that the appropriator acquired a higher right, a right more nearly equivalent to absolute property or ownership, than in cases where the appropriation is made simply for the purpose of milling, or of propelling machinery of any kind. In the latter case the use is not a consumption, and the water may be returned to its natural channel, after the use, without substantial diminution in quantity. Decisions concerning milling do not, therefore, in my opinion, furnish a necessary rule for other kinds and purposes of appropriation. In *Ortman v. Dixon*¹ the court said, concerning one who had appropriated water for a mill: "Whether A., by erecting a mill and dam, becomes entitled to the water *in specie*, or whether he is entitled to anything more than the use of the water as a motive power; whether there may not be an appropriation of the mere use, as well as an appropriation of the water itself, the *corpus* of the water, for sale,—are questions which need not be and are not now decided." In the later case of *McDonald v. Askew*² the court laid down a more definite rule on this particular matter: "One who locates on a stream, and appropriates the water for a mill or other machinery, does not obtain a *property* in the water as such, but only a right to the momentum of its fall at that place, and to the flow of the water in its natural channel."

§ 57. Property in ditches and canals.

There is, of course, a plain distinction between the appropriator's right to the water which he diverts, and his right to the canal, ditch, reservoir, or other structure through which the

¹13 Cal. 33.

²29 Cal. 200.

water is conveyed. A ditch or canal itself, used for conveying the water to a mine or elsewhere, is not a mere easement or incorporeal hereditament; it is land.¹ If, therefore, a ditch runs from a stream to a mining "claim," and belongs to the owner of the mine, who uses a portion of its water in working his mining claim, it does not follow that the ditch is an appurtenant of the mining claim. And if the owner of a mining claim purchases a water ditch, "and the water-rights thereto appertaining," this purchase does not of itself constitute the ditch and water-rights appurtenances of the mining claim.²

§ 58. Sale of ditches and water-rights.

The exclusive right to divert and use the water of a stream acquired by appropriation, as well as the ditch or other structure through which the diversion is effected, may be transferred and conveyed like other property or rights analogous to property. If a person having a possessory right to a parcel of land on a stream has erected a mill thereon, and has acquired a right to the water of the stream for his mill, a valid sale and conveyance of such real property transfers the water-right also to the vendee.³ While a ditch or other similar structure for appropriating and diverting water may be sold, the sale and conveyance must be by a written instrument,—a deed,—as in the case of other real estate. A mere verbal sale or transfer would be nugatory.⁴ A person who enters into possession of such a ditch,

¹Reed v. Spicer, 27 Cal. 61.

²Quirk v. Falk, 47 Cal. 453.

³McDonald v. Bear River, etc., Co., 13 Cal. 220.

⁴Smith v. O'Hara, 43 Cal. 371; Lobdell v. Hall, 3 Nev. 507. [A water-right can be conveyed by a bill of sale not under seal. It certainly passes the equitable title, and that is sufficient, under our

law, when fortified by possession. Ortman v. Dixon, 13 Cal. 33. A co-owner of a water-right, acquired by appropriation, can convey his own interest, but cannot convey so as to injuriously affect his cotenant's right. Henderson v. Nicholas, 67 Cal. 152, s. c. 7 Pac. Rep. 412.]

under a mere verbal sale to himself, does not succeed to any rights of priority held by the vendor, so as to obtain the benefit of the vendor's prior appropriation; he must date his own appropriation, as against all other opposing claimants, from the time when he enters into possession.¹ In a very recent decision by the supreme court of Nevada, this same rule was declared in the most general form: "Where, in a contest concerning priority, a party claiming a right to water by appropriation *fails to connect himself in interest* with those who first appropriated and used the waters of a stream, his own appropriation of the water must be treated as the inception of his right;" or, in other words, his right of appropriation must be dated from the time when he himself began to use the waters; he cannot link his own use onto that of the former occupants, and thus claim to be a successor to their prior rights. Their prior appropriation is virtually abandoned.²

§ 59. Tenancy in common.

Wherever ditches or other structures for diverting and appropriating water belong to two or more proprietors, such owners are, in the absence of special agreements to the contrary, tenants in common of the ditch, and of the water-rights connected therewith, and their proprietary rights are governed by the rules of law regulating tenancy in common.³ [But persons claiming rights in the waters of a stream, derived from the same original proprietors, are not necessarily tenants in common; and a convention *inter sese* of the owners as to the use of all the waters appropriated, by or under which the water is to be used for recur-

¹Smith v. O'Hara, *supra*.

²Chiatovich v. Davis, 17 Nev. 133. This decision plainly formulates a general rule, of which that

laid down in Smith v. O'Hara is a particular instance.

³Bradley v. Harkness, 26 Cal. 69.

ring periods of time by each, will not make them tenants in common.¹

Of tenants in common, each has a right to enter upon and occupy the whole of the common property, and every part thereof, and may recover the whole thereof from a trespasser; and an arrangement as to periods for the use of the water, among the co-tenants, affects them only, and is for their convenience, and is no defense to an action of trespass against a third party by one of the co-tenants. In the case where this principle was laid down, Thornton, J., observed: "It is said that the waters were appropriated severally by those who did appropriate them. Concede this to be so, and we do not perceive that it makes any difference. If they are tenants in common of the water, such tenants and each of them are tenants seized *per my* and not *per tout*, and entitled to the possession of the whole. This must be so, because no one of them can certainly state which part of them is his own. They hold by unity of possession, though their titles be distinct. If this unity is destroyed, the tenancy no longer exists.² * * * Whether joint appropriators, holding the estate as joint tenants or tenants in common, the same is the result. Each can recover the whole, or take the necessary steps to protect the whole against the acts of a wrong-doer."³

Further, a court of equity has power to ascertain and determine the extent of the rights of property in water flowing in a natural water-course, acquired by persons who hold and are entitled to them, and to regulate, between or among them, the use in the flow of the water in such a way as to maintain equality of rights in the enjoyment of the common property.⁴ Hence,

¹Lytle Creek Water Co. v. Per-
dew, (Cal.) 2 Pac. Rep. 732.

²Citing 2 Bl. Comm. 191, 192;
Carpentier v. Webster, 27 Cal. 524.

³Lytle Creek Water Co. v. Per-
dew, (Cal.) 4 Pac. Rep. 426.

⁴Frey v. Lowden, (Cal.) 11 Pac.
Rep. 833.

where one of two or more co-owners, in the use of water of a stream appropriated by them for beneficial purposes, diverts for use a greater quantity of water than of right belongs to him, so as to materially diminish the quantity to which the others are entitled, such parties are entitled to enjoin the wrong-doer from diverting the water to their injury.^{1]}

§ 60. Right to natural flow of water at head of ditch.

Although the appropriator has no property in the water of the stream flowing in its natural channel above his point of diversion, yet he acquires a most important *right* over or with respect to such water. This general right over the stream, of the party who has perfected a prior appropriation, is that the water of the stream should continue to flow in its usual manner, through the natural channel or bed of the stream, down to the head of his ditch, or to the point where his own actual dominion over it commences, to the extent or amount of his appropriation, without diversion or material interruption.² In a recent decision the court used the following language descriptive of this right: "The plaintiff's right to have the water flow in the river to the head of his ditch is an incorporeal hereditament appurtenant to his [artificial] water-course, [*i. e.*, his ditch.] Granting that the plaintiff does not own the *corpus* of the water until it shall enter his ditch, yet *the right to have it flow into the ditch* appertains to the ditch."³ In another case a ditch, conveying water for purpose of sale to miners, took its water from

¹Lorenz v. Jacobs, (Cal.) 3 Pac. Rep. 654; citing Story, Eq. Jur. § 927.

²Lower Kings River, etc., Co. v. Kings River, etc., Co., 60 Cal. 408; Parks Canal & M. Co. v. Hoyt, 57 Cal. 44; Reynolds v. Hosmer, 51 Cal. 205; McDonald v. Askew, 29

Cal. 200; Phoenix W. Co. v. Fletcher, 23 Cal. 481; Natoma W. & M. Co. v. McCoy, Id. 490; Kidd v. Laird, 15 Cal. 161; Barnes v. Sabron, 10 Nev. 217.

³Lower Kings River, etc., Co. v. Kings River, etc., Co., 60 Cal. 408.

a stream near its head in the mountains, and thence ran for a distance of twenty-four miles, the water flowing through its entire length. The title to the upper half of the ditch was vested in A., and that of the lower half in B. A. was held to be entitled to the exclusive use of the water from the stream at the head of the ditch.¹ In *Phoenix Water Co. v. Fletcher*² it was held that the prior appropriator of a stream on the public lands, for mining purposes, has a right to have the water flow down the stream, above the point of his appropriation, without interruption or diminution in quantity.

§ 61. What are streams subject to appropriation.

The question here arises, what is a "stream" which may thus be appropriated? I do not purpose to enter into any full discussion of this question, which may be regarded as rather speculative than practical throughout these Pacific communities. It is sufficient to say that there must be an actual, natural stream, with defined banks, bed, channel, and current, as contradistinguished from a mere occasional torrent or flow of surface water from rains or melting snow, through a hollow or depression in the surface of the soil. The essential nature of a "stream" which can be appropriated was briefly but accurately described by the supreme court of Nevada in a leading case:³ "To maintain the right to a water-course, it must be made to appear that the water *usually* flows therein in a certain direction, and by a regular channel with banks or sides. It need not be shown to flow continually, and it may at times be dry, but it must have a well-defined and substantial existence." It would plainly be impracticable to require, as an essential element of a "stream" in these Pacific states and territories, that the flow of water should be continuous, uninterrupted, and perennial, during the entire

¹ *Reynolds v. Hosmer*, 51 Cal. 205.

² 23 Cal. 481.

³ *Barnes v. Sabron*, 10 Nev. 217.

year, and from year to year. It is well known that some of the most important and well-defined streams in these regions become dry throughout the whole or a considerable portion of their lengths during certain seasons of each year. It is, perhaps, more correct to say that their waters sink beneath their beds, and flow beneath the surface instead of in their channels on the surface. All these streams, nevertheless, have well-defined beds, channels, banks, and currents, and are in every respect natural "streams."

§ 62. Definition and characteristics of a water-course.

[In order to constitute a water-course, there must be a defined channel, banks, and water usually flowing in a particular direction. It need not flow constantly; it may at times be dry; but the source, it is usually said, must be natural, certain, and definite, and not dependent upon the fluctuations of the seasons, as the falling of rain and the melting of snow.¹ But if the face of the country is such as necessarily to collect in one body so large a quantity of water, after heavy rains or melting of snows, as to require an outlet to some common reservoir, and if such water is regularly discharged through some well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows and has flowed from time immemorial, such channel is a natural water-course.²

Surface water, without a spring, when it has flowed in a cer-

¹ *Hanson v. McCue*, 42 Cal. 303; *Dickinson v. Worcester*, 7 Allen, 19; *Shields v. Arndt*, 4 N. J. Eq. 234; *Gillett v. Johnson*, 30 Conn. 180; *Luther v. Winnisimmet Co.*, 9 Cush. 172; *Macomber v. Godfrey*, 108 Mass. 219; *Ashley v. Wolcott*,

11 Cush. 192; *Gannon v. Hargadon*, 10 Allen, 106; *Buffum v. Harris*, 5 R. I. 243.

² *Earl v. De Hart*, 12 N. J. Eq. 280; *Palmer v. Waddell*, 22 Kan. 352. Compare, however, *Parks v. Newburyport*, 10 Gray, 23.

tain direction for such a length of time as to have naturally formed a bed and banks and well-defined stream of flowing water, even though it may sometimes be dry at the place where it has formed such banks and bed, is still a water-course at that point.¹

In regard to the channel of the stream, it is required that it should have a distinct and substantial existence, with well-defined banks formed by the flow of the water, and presenting unmistakable evidence to the eye of the frequent action of running water.² Thus, sloughs or swales, hollows or ravines, by which water passes over land, are not, in the technical sense, water-courses.³ Upon this point we find some instructive remarks in a recent decision of the supreme court of California. It was said by McKinstry, J.: "It is not essential to a water-course that the banks shall be unchangeable, or that there shall be everywhere a visible change in the angle of ascent marking the line between bed and banks. The law cannot fix the limits of va-

¹ *Eulrich v. Richter*, 41 Wis. 318; *Kelly v. Dunning*, 39 N. J. Eq. 482; *Pyle v. Richards*, 17 Neb. 180, s. c. 22 N. W. Rep. 370. In the case of *West v. Taylor*, (Or.) 13 Pac. Rep. 665, it appeared that A. owned lands adjoining a lake, about two miles long and half a mile wide, fed by perennial springs and a mountain creek. Originally the main outlet from the lake was a second creek, into which the waters flowed at ordinary stages. From the western part of the lake flowed a third creek, which emptied into a creek that flowed into the Pacific ocean. The main outlet becoming choked up with sand, the waters overflowed the lands of B. and C. on the north of the lake, forming marshes and swales, and escaped into a creek flowing into a bay;

and for several years this was the main outlet from the lake. B. and C. erected a dike to protect their land, which raised the water in the lake, and threw it back upon A.'s land, overflowing about one thousand acres. Previous to erecting the dike, B. and C. had cut two ditches that carried the water off their land. On this state of facts it was held that the waters on the lands of B. and C. could not be considered merely as surface water, but constituted a water-course, and that B. and C. had no right to erect the dike.

² *Gibbs v. Williams*, 25 Kan. 214, s. c. 37 Amer. Rep. 241; *Shively v. Hume*, 10 Or. 76.

³ *Jones v. Wabash, etc., R. Co.*, 18 Mo. App. 251.

riation in these and other particulars. As was said, in effect, by Curtis, J., in *Howard v. Ingersoll*, 13 How. 428, the bed and banks or the channel is in all cases a natural object, to be sought after, not merely by the application of any abstract rules, but, 'like other natural objects, to be sought for and found by the distinctive appearances it presents.' Whether, however, worn deep by the action of water, or following a natural depression without any marked erosion of soil or rock; whether distinguished by a difference of vegetation, or otherwise rendered perceptible,—a channel is necessary to the constitution of a water-course. Of course, we cannot judicially declare that a channel is of such a nature that it can never cease to exist. Both the evidence and findings herein show that, as a result of the action of water, channels have been closed and new channels formed. We cannot say but the indications of a channel may be removed by other natural forces. We can conceive that along the course of a stream there may be shallow places where the water spreads, and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on each side. In such case, if water flowed periodically at the lowest portion of the depression, it flowed in a channel, notwithstanding the fact that, the water being withdrawn, the 'distinctive appearances' that it had ever flowed there would soon disappear."¹ On the other hand, in a later case from the same court, it appeared that the owner of lands, upon which there was a lagoon having no natural outlet, cut a ditch for irrigating purposes. Thereafter he conveyed part of the land on which the lagoon was situated to the defendants, and the remainder of his lands to the plaintiffs. The irrigating ditch ran between the different tracts conveyed. By parol permission of their grantor, (the defendants,) the plain-

¹ *Lux v. Haggin*, (Cal.) 10 Pac. Rep. 770.

tiffs had used the waste waters of the ditch. On this state of facts it was held that, the water never having flowed in any natural channel, the plaintiffs never acquired any riparian rights in the flow of water in the ditch.¹

§ 63. Percolating and subterranean waters.

[Percolating waters collected or gathered in a stream, running in a defined channel, are such property or incidents thereof as may be acquired by grant, express or implied, or by appropriation; and, when rights in them are thus acquired, the owner cannot be divested of his rights by the wrongful act of another.² Thus a lake, fed by streams and having a natural channel, and whose waters find exit by percolation in a perceptible current through a bed of gravel, is a running stream, and may not be obstructed so as to set back upon the lands of another.³ The word "percolate," as used in the cases relating to the right of land-owners to use water on their premises, designates any flowage of sub-surface water other than that of a running stream, open, visible, and clearly to be traced.⁴

In regard to subterranean streams, the general *consensus* of the authorities appears to be that, if an under-ground current of water flows in a known and well-defined channel, so as to constitute a regular and constant stream, the riparian owner may invoke the same rules, in insisting upon its uninterrupted flow, which exist in the case of water-courses upon the surface.⁵ And

¹ Green v. Carotto, (Cal.) 13 Pac. Rep. 685. And see Gillett v. Johnson, 30 Conn. 180; Macomber v. Godfrey, 108 Mass. 219.

² Cross v. Kitts, 69 Cal. 217, s. c. 10 Pac. Rep. 409; Brown v. Ashley, 16 Nev. 317.

³ Hebron Gravel Road Co. v. Harvey, 90 Ind. 192, s. c. 46 Amer. Rep. 199.

⁴ Mosier v. Caldwell, 7 Nev. 363. See a valuable editorial note on Percolating Waters in 64 Amer. Dec. 727.

⁵ Dickinson v. Grand Junction Canal Co., 7 Exch. 282; Chasemore v. Richards, 2 Hurl. & N. 186; Cole S. Min. Co. v. Virginia Water Co., 1 Sawy. 470; Hale v. McLea, 53 Cal. 578; Strait v. Brown, 16 Nev. 317;

so, where the exact course of water which has once emerged and sunk can be traced to where it emerges again, the proprietor at this point is protected in its use as if it were not a subterranean stream.¹ But if the water flows beneath the surface without a definite channel, or in courses which are unknown or unascertainable, it is not subject to the settled law governing the rights of riparian owners.²

§ 64. Right to exclusive use of water.

Such being the appropriator's right over the *stream* as such, I proceed to consider his rights over the water which comes under his exclusive control by means of an actual diversion and appropriation. The general doctrine is settled, by the unanimous consent of the authorities, that the prior appropriator is entitled to the exclusive use of the water, up to the amount embraced in his appropriation, either for the original purpose or for any other or different purpose, provided the amount is not thereby increased, without diminution or material alteration in quantity or in quality; and his use will, to that extent and for such purposes, be protected against all subsequent appropriators or claimants using or interfering with the water, both above and below on the same stream; and to this end he may obtain all proper remedies, legal and equitable.³ As illustrations, it is

Mahan v. Brown, 13 Wend. 261; Smith v. Adams, 6 Paige, 435; Wheatley v. Baugh, 25 Pa. St. 528; Whetstone v. Bowser, 29 Pa. St. 59; Haldeman v. Bruckhart, 45 Pa. St. 514; Taylor v. Welch, 6 Or. 198.

¹ Saddler v. Lee, 66 Ga. 45, s. c. 42 Am. Rep. 62.

² Chasemore v. Richards, 7 H. L. Cas. 349; Dickinson v. Grand Junction Canal Co., 7 Exch. 282; Acton v. Blundell, 12 Mees & W. 324; Hanson v. McCue, 42 Cal. 303;

Haldeman v. Bruckhart, 45 Pa. St. 514; Taylor v. Welch, 6 Or. 198.

³ Himes v. Johnson, 61 Cal. 259; Stein Canal Co. v. Kern Island L. C. Co., 53 Cal. 563; Reynolds v. Hosmer, 51 Cal. 205; Gregory v. Nelson, 41 Cal. 278; Clark v. Willett, 35 Cal. 534; Davis v. Gale, 32 Cal. 23; McDonald v. Askew, 29 Cal. 200; Hill v. Smith, 27 Cal. 476; 32 Cal. 166; Rupley v. Welch, 23 Cal. 453; Phoenix W. Co. v. Fletcher, Id. 482; Natoma W. Co. v. Mc-

held in *Kimball v. Gearhart* that, when the appropriator has completed his ditch so as to receive the water appropriated, "he is then entitled to said water as against all persons subsequently claiming or locating it;" and "possession or actual appropriation is the test of priority in all claims to the use of water, when such claims are not dependent upon the ownership of the land through which the water flows." In *Ortman v. Dixon* it is held that "a prior appropriator of water for mill purposes is entitled to it to the extent of his appropriation, and for those purposes to the exclusion of any subsequent appropriation for the same or for other purposes." In *Barnes v. Sabron* the supreme court of Nevada held that "the first appropriator, for purposes of irrigation, of the water of a stream running through the public lands, has the right to insist that the water flowing therein shall, during the irrigating season, be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use. To this extent his rights go, but no further; for, in subordination to such rights, subsequent appropriators may appropriate the remainder of the water running in said stream."

§ 65. Appropriator may change place or manner of use.

Whenever a prior appropriation has been made for a certain kind of purpose or use, at a certain place, the appropriator may, as against other parties whose rights have accrued subsequently to his own, change the place of his use for the same purpose, if the amount of water taken by him is not thereby increased beyond that of his original appropriation; and it seems that he

Coy, Id. 490; *Butte, etc., Co. v. Morgan*, 19 Cal. 609; *Kidd v. Laird*, 15 Cal. 161; *Kimball v. Gearhart*, 12 Cal. 27; *Ortman v. Dixon*, 13 Cal. 33; *Bear River, etc., Co. v. New York M. Co.*, 8 Cal. 327;

Ophir Silver M. Co. v. Carpenter, 4 Nev. 534; *Barnes v. Sabron*, 10 Nev. 217; *Strait v. Brown*, 16 Nev. 317; *Atchison v. Peterson*, 20 Wall. 515.

may, as against such parties, change the nature of the purpose or use to which the water was applied, provided the amount of water thereby taken is not increased, or the interference with or burden upon the subsequent claimants or appropriators is not augmented.¹ But such a change of place or of purpose is not permitted, as against parties who have acquired subsequent rights, when it would enlarge the amount of water used beyond that of the original appropriation, or otherwise increase the burden imposed upon them by such appropriation. These conclusions seem to be established by the decisions. In *Woolman v. Garringer*² it was held that a prior appropriator for mining purposes, at a certain place, may extend his ditch, and use his water, to the extent of his original appropriation, at any other place, for the same or *for other purposes*. Such an appropriator, who has duly constructed his dam and ditch, need not give an actual notice to subsequent appropriators of his intention to extend his ditch, and reclaim his waste water, and use the water at another place. In *Macris v. Bicknell*³ the rule was stated that a mere change of the use from one mining place to another, where the appropriation was for mining purposes, does not for-

¹[A riparian owner, having the right to divert a certain quantity of water from a stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, provided he does not injuriously affect the rights of other appropriators by such change. *Junkans v. Bergin*, 67 Cal. 267, s. c. 7 Pac. Rep. 684. An appropriator may, as against a subsequent purchaser from the United States, carry his ditch through such purchaser's lands to a point higher up the stream, where such a change is rendered necessary to enable him to obtain

the supply he is entitled to. *Ware v. Walker*, (Cal.) 12 Pac. Rep. 475. And see *Sieber v. Frink*, 7 Colo. 148, s. c. 2 Pac. Rep. 901. This is also the doctrine of the common law. In *Whittier v. Cocheco Manuf'g Co.*, 9 N. H. 454, it is stated that, where a right exists to use a certain quantity of water for propelling machinery, a change may be made in the mode and objects of the use, and in the place of using it, if the quantity is not increased, and the change is not to the prejudice of others.]

²1 Mont. 535.

³7 Cal. 261.

feit nor abandon nor affect the prior right of the appropriator. In *McDonald v. Bear River, etc., Co.*,¹ after declaring that the appropriation of water for mill purposes stands on the same footing as an appropriation for mining, the court said that when a party has erected a saw-mill, and appropriated the water of a public stream for it, he may use the water for a grist-mill which he subsequently erects. In *Kidd v. Laird*² the doctrine on this subject was announced in the following broad and general manner: "A person entitled to divert a given quantity of the water of a stream may take the water at any point of the stream, and may change the point of diversion at pleasure, if the rights of others are not injured by such change. This right of change does not depend upon the mode of acquiring the right to use the water, whether by express grant or by prescription, or whether by parol license or presumed consent of the proprietor. The difference as to the origin of the right affects the mode of determining its existence and its extent, [*i. e.*, the amount of water appropriated,] *and not the manner of its exercise and enjoyment.*" The proper limitation upon this doctrine was stated in the subsequent case of *Butte T. & M. Co. v. Morgan*,³ which held that a party appropriating and diverting water at a certain point cannot afterwards change the place of diversion so as to prejudice another person whose rights have subsequently accrued. And it was further said that the case of *Kidd v. Laird* does not hold anything conflicting with this conclusion, and the decision in that case, as there explained and limited, was reaffirmed. In *Davis v. Gale*⁴ the court again laid down the general rule in the most unequivocal manner: "A person who has appropriated the water of a stream, and caused it to flow to a particular place by a ditch, for a special use, may afterwards change the use, and the place at which he used it, without losing his priority

¹ 13 Cal. 220.² 15 Cal. 161.³ 19 Cal. 609.⁴ 32 Cal. 26.

as against one who dug a ditch from the same stream before the change was made. Such a person, appropriating water for the working of a particular mine, may, after he has worked out and abandoned said mine, extend the ditch, and use the water at other points, without losing his priority as against a person who acquired rights in the stream subsequently to his appropriation. Appropriation and use of water for beneficial purposes are the tests of right in such cases, and not the place and character of the particular use." In *Nevada W. Co. v. Powell*¹ the negative side of the rule was again applied, and the court said: "If a person has appropriated a *portion* of the water of a stream, and has made a dam and ditch amply sufficient to render his appropriation available, and has thereby acquired the right to use said portion only of such water, and in said manner only, this will not prevent other persons from acquiring a right to the *surplus* water of the stream, or to its bed or banks, or to the adjacent land, to any extent which will not interfere with the right previously acquired. When rights of subsequent appropriators once attach, the prior appropriator cannot encroach on them by extending his use beyond the first appropriation. In such a case the first appropriator cannot extend his claims, or change the manner of his appropriation, to the injury of the second appropriator, any more than the second can do so to the injury of the first; each is, in respect to his own appropriation, prior in time and exclusive in right." On this ground, it was held that the prior appropriator was not authorized, by raising the height of his dam, to cut off or diminish the flow of the *surplus* water which had been thus appropriated by the defendants.

¹34 Cal. 109. The facts of this case, however, to which the decision applies, show an increase in the quantity of water used,—in the

extent of the appropriation,—rather than a change in the place or in the kind of the use.

§ 66. Remedies for interference with these rights.

Such being the rights of the appropriator, any interference with the water of the stream itself, either above or below the point of his diversion, which hinders the full enjoyment of those rights, and any interference with the water while in the ditch, dam, or reservoir, or with these structures themselves, are injuries, for which suitable remedies may be obtained.

§ 67. Injuries to ditches.

A ditch may be injured, or even destroyed, by mining under it, thereby causing the surface of the soil over which the ditch runs to crack and settle. In such a case the mine-owners are liable to the proprietor of the ditch when the injury has been caused by their negligent or unskillful manner of conducting their mining operations; but whether they are liable for such an injury in the absence of all negligence and unskillfulness is more than doubtful.¹ In the case cited, which was brought to restrain the mining operations under such circumstances, the court say that the plaintiff has a right to a ditch on the surface of the soil, and the defendants have a right to mine under the surface. These rights are not *necessarily* incompatible or conflicting. To the two parties so situated the maxim, *qui prior est in tempore potior est in jure*, does not apply, but rather the maxim, *sic utere tuo ut alienum non lædas*. How far a court of equity will relieve against such an injury, when no negligence or lack of skill is charged, the court expressly refrain from deciding, and suggest the following query: "Whether ditch property in the mining regions, although conceded to be real estate, is to be regarded by courts of equity with the same measure of favor as that which is extended to land held by owners for its own sake, and not put to use for an ulterior object, is doubted,

¹Clark v. Willett, 35 Cal. 534.

but not decided." It is abundantly settled that parties engaged in mining operations will be restrained from interfering with, or destroying or washing away, the ditch belonging to another person. The rights of a prior ditch-owner, as against persons engaged in mining, were fully established by the case of *Gregory v. Nelson*,¹ in which the following points were decided: If the complaint avers ownership by the plaintiff of a certain ditch, and that the ground over which it runs was vacant and unoccupied when it was dug, and the plaintiff has used it for years for mining purposes, and the answer does not deny these allegations, nor set up any prior right of defendants to said ground, nor any claim or right of defendants to destroy the ditch, the court should enjoin the defendants from destroying or interfering with the ditch upon the pleadings, regardless of the testimony. If a party owns a ditch, and the right of way for the same, to conduct water for mining purposes, and has acquired such right by prior appropriation, the court, in an action brought to restrain the defendants from washing away the ground, should not allow the defendants to wash away the ditch, provided they build a flume or other aqueduct in place of the ditch of sufficient capacity to carry the water flowing through it. A court of equity had no power to make such a decree under these circumstances. A court should not license a trespass to ditch property in the mining regions, nor compel the owner to exchange his ditch for some other means of conveying the water flowing therein.

§ 68. Remedies for unlawful diversion.

Interference with the water to which the appropriator is entitled, whether flowing in the stream or running through his ditch, may either diminish its *quantity* or deteriorate its *quality*. These two kinds of injuries will be considered separately.

¹41 Cal. 273.

Of course the mere use of the water by another person, when its quantity is not thereby lessened nor its quality deteriorated, is no injury to a prior appropriator. If, therefore, A. owns a ditch, and has the right to divert the water of a certain stream by its means, and B. subsequently takes water from the same stream at a place above the head of A.'s ditch, and uses it for his own purposes, but returns it back undeteriorated in quality into the stream before it would reach A.'s ditch, or even into the upper part of the ditch itself at a point before A. has use for it, no injury is thereby done to A., and he has no cause of action against B. therefor.¹ Whenever the rights of a prior appropriator exist, they are equally protected from interference and consequent injury by parties subsequently locating on the stream or using its water either above or below him.² The diversion of the water of a stream is a private nuisance to the prior appropriator who is injured thereby, and he can maintain an action for such nuisance. For a past diversion the only remedy is a recovery of damages; but, when the diversion is continuing, equity will interfere by injunction.³ It seems the injured party may himself abate the nuisance. When A. attempts to erect a dam for the purpose of diverting the water of a stream at a certain place, and such diversion is unlawful as against B., who is a prior appropriator and has a dam at a lower point on the

¹Yankee Jim's Union W. Co. v. Crary, 25 Cal. 504.

²Hill v. King, 8 Cal. 337.

³Tuolumne W. Co. v. Chapman, 8 Cal. 392; Parke v. Kilham, Id. 77. In Brown v. Ashley, 16 Nev. 312, the court held that where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length of time, would ripen into an adverse right, and deprive the plaintiff of his property, he is not only entitled to an action for the vindication of

his right, but also for its preservation. In actions, therefore, for the diversion of water, where there is a clear violation of an established right, and a threatened continuance of such violation, it is not necessary for the plaintiff to show actual damages, or even a *present* use of the water, in order to authorize a court to issue an injunction restraining the actual or threatened diversion, and to make it perpetual.

stream, it is held that B. may oust A. from possession, and may prevent the construction of his dam.¹ Where a party has located on a stream, erected a mill, and appropriated the water for its use, in an action against a mere trespasser to recover damages for diverting the water, it is sufficient that the complaint alleges the plaintiff's *possession* of the land, the mill-site, and the mill, without averring riparian *ownership* or a prior appropriation of the water.² In a suit to obtain relief against an injury to the plaintiff's rights as a prior appropriator, it is no defense whatever that the defendant's works are the more valuable, or his interests the more important.³ Where an appropriation has been made at a particular point, a person subsequently locating or constructing works on the same stream above must not impede the regular flow of the water, if the prior appropriator would be injured thereby. A mere trivial or temporary irregularity caused in the flow does not constitute a cause of action; but a sensible injury will be restrained by injunction, as well as compensated for in damages.⁴ Where a ditch-owner uses a ravine as a part of his ditch to conduct the water of a stream which he has appropriated, the natural waters of such ravine belong to him as the first appropriator thereof, and an action will lie in his favor for an appropriation or diversion of such waters by a third person.⁵

§ 69. Equitable jurisdiction.

[It was stated in the preceding section that, where the unlawful diversion is continuing, a court of equity will interfere by injunction against the wrong-doer. In order to obtain this

¹ Butte T. M. Co. v. Morgan, 19 Cal. 609.

² McDonald v. Bear River, etc., Co., 13 Cal. 220.

³ Weaver v. Eureka Lake Co., 15 Cal. 271.

⁴ Phoenix W. Co. v. Fletcher, 23 Cal. 481; Natoma W. & M. Co. v. McCoy, 23 Cal. 490.

⁵ Hoffman v. Stone, 7 Cal. 46.

assistance from chancery, it is not necessary for the complainant to have recovered his damages at law. "Under our Codes," say the California court, "the riparian proprietor is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. The decisions (in cases of alleged nuisances) based on the failure of the complainant to have had his right established at law have no appositeness here. Here the plaintiff must, indeed, clearly make out his right in equity, and show that money damages will not give him adequate compensation. If he fail to do this, relief in equity will be denied; but, if he proves his case, relief will be granted, although he has not demanded damages at law. In the case at bar, the plaintiffs do not admit that damages would constitute compensation, and ask for an injunction until they shall recover such compensation in an action for damages. The decisions which bear on that class of cases, and which require of the plaintiff to show that he has promptly sought redress at law, have little applicability."¹ And indeed it is settled that an action of ejectment will not lie to recover possession of a water-course.²

Since a court of equity may grant or withhold its aid according to the circumstances, its intervention can only be secured by the presentation of a substantial case. Thus, each riparian proprietor has a right, within his own territory, to the use of the water as it flows, returning it to the channel of the stream for the use of others below; but if the water may be conveniently used by two riparian owners, without strictly enforcing such right, a court of equity may refuse to lend its aid; and accordingly it has been held that a riparian owner would not be enjoined from taking water from a river for the use of his mill,

¹Lux v. Haggin, (Cal.) 10 Pac. Rep. 688.

²Swift v. Goodrich, (Cal.) 11 Pac. Rep. 561; Ang. Water-Courses, § 8.

although it was not returned to the channel of the river before it reached the territory of an adjoining owner, where it was not clear from the evidence that such adjoining owner could not use the water, with substantially the same results, through the race of the defendant's mill.¹ And, further, equity has jurisdiction for taking the necessary steps to make its decrees effectual. Hence, when the court has jurisdiction to grant an injunction restraining the unlawful diversion of waters, it may also require the defendant to remove the obstructions by means of which the diversion is effected.²

Unless the flow of a stream to the land of a riparian proprietor has been appreciably or perceptibly diminished, he is not entitled to an injunction against another for wrongfully diverting water from the stream.³ But at the same time, as stated in a late case, a continuous wrongful diversion of water will be restrained in equity at the instance of a prior appropriator thereof, although no actual damages are averred or proved; the relief being granted in such cases to prevent the wrongful acts from ripening into a right.⁴ Hence, also, the complaint in an action by an appropriator of water, to restrain the unlawful diversion of the stream, need not allege that the plaintiff is in a position to use the water himself, or that he is in any position which gives him a right to furnish it to others; but it is sufficient to allege that he has a right to the use and enjoyment of the water.⁵ So the riparian owner is entitled to the aid of equity to enjoin a diversion, notwithstanding he may have made no use of the water-power himself, or sustained but small pecuniary damages,

¹Mason v. Cotton, 4 Fed. Rep. 792.

²Johnson v. Superior Court of Tulare Co., (Cal.) 4 Pac. Rep. 576.

³Moore v. Clear Lake Water-Works, (Cal.) 5 Pac. Rep. 494;

Creighton v. Kaweah Canal Co., 67 Cal. 221, s. c. 7 Pac. Rep. 658.

⁴Moore v. Clear Lake Water-Works, 68 Cal. 146, s. c. 8 Pac. Rep. 816.

⁵Id.

and although the defendant may be subjected to heavy expense if compelled to restore the water to its original channel.¹

In regard to the *parties* to actions of this character, the rule seems to be established that, where each of two defendants made a diversion of the water for his own benefit, separately from the other, and without any collusion or joint action between them, a joint action to recover damages for such diversion is not maintainable.² Under the peculiar system of "irrigating ditches," prevailing in some of the states and territories, it is held that the owners of irrigated lands, who have the right to take water from such a ditch, may bring suit for an injunction against one who wrongfully diverts water from the ditch to their injury, though the ditch be the property of another. "Though the owners of the ditch are entitled to toll for the water, the owners of the land are entitled to the water on payment of the toll. The diversion of the water from the ditch would injure the owner of the ditch, it is true, but it would also injure the owner of the land to be irrigated, to deprive him of the water. The owner of the ditch, for many reasons, might decline to sue. He might be in collusion with the wrong-doer to destroy the value of plaintiff's lands, in the hope of buying them. He might be actuated by private malice. He might, from motives of economy, refuse to embark in a lawsuit of this character. The rights of plaintiff would be of little value if they were subject to the interest, whim, or caprice of the owner of the ditch."³

In an action on an injunction bond to recover damages for loss of plaintiff's crops, by reason of his being restrained from using the water in a certain ditch, the evidence showed that there was a great scarcity of water, and that it could not have

¹Weiss v. Oregon Iron Co., 13 Or. 496, s. c. 11 Pac. Rep. 255; citing High, Inj. § 795.

²Evans v. Ross, (Cal.) 8 Pac. Rep. 88.

³Clifford v. Larrien, (Ariz.) 11 Pac. Rep. 397.

reached the plaintiff's lands, whereupon a verdict for nominal damages was rendered and sustained; and it was further held that where a party sues for damages for such a cause, if it is shown that he could have obtained water from another source, he will not be entitled to receive a greater sum than he would have had to expend to obtain water from such source.¹

The prior locator of a mining claim on the bank of a stream has a right to the use of the bed of the stream for the purpose of fluming or working his claim, and may recover damages for the obstruction of such right by parties who subsequently erect dams or embankments upon the stream, by reason of which he is hindered from working his claim by flumes or other necessary means or appliances.²]

§ 70. Deterioration of quality of water.

With respect to deterioration in the *quality* of the water, caused by subsequent locators or claimants higher up the stream, there was at an early day some doubt; but the rule is now settled that an interference of this kind producing injury will be treated in the same manner as an interference with the quantity. In the early case of Bear River, etc., Co. v. New York M. Co.³ the plaintiff was the prior appropriator of water for mining purposes. The defendants took the water at a point higher on the stream, used it for their mining purposes, and then sent it down the stream undiminished in quantity, but filled with mud, sand, gravel, and other mining *debris*. In regard to this the court, after stating the rule concerning diminution in quantity, said: "As to deteriorations in *quality* by the water being used for mining above the plaintiff, this is *damnum absque injuria*. Any other rule would prohibit any use of the whole water of a stream, so as to preserve a small quantity of it first appropriated." The

¹ Mack v. Jackson, (Colo.) 13 Pac. Rep. 542.

² Sims v. Smith, 7 Cal. 148.

³ 8 Cal. 327.

conclusion reached in this decision was antagonistic to the claims of the prior appropriator, and, if final, would plainly render his rights very precarious, and liable, in fact, to complete destruction by such a pollution of the water as would make it wholly unfit for his purposes. In the subsequent case of *Hill v. Smith*¹ this former decision was entirely abandoned, and a rule was established which fully protects all the rights of the prior appropriator. The court held that if parties engaged in mining operations above the head of a ditch belonging to a prior appropriator, on the same stream, injure the water by means of mud, sand, sediment, or other mining *debris*, they are liable therefor to the ditch-owner, and their liability is not at all a question of negligence or unskillfulness. If the ditch-owner is *in fact* injured, the miners are liable, even though such injury is not caused by their negligent or unskillful methods of mining. As between ditch-owners and miners using the same stream, the law does not tolerate *any* injury by one to the prior rights of the other. In regard to the basis of these rights, the court say that the reasons which underlie the common-law rules concerning riparian rights have not lost their force in the mineral regions of this state. The rule thus settled cannot be restricted to the pollution of water by mining operations alone. It must extend to all modes of deteriorating the quality of water by which injury is done to a prior appropriator. This view is taken of it by the supreme court of Utah, which holds that when the water of a stream had been appropriated and diverted by a ditch for purposes of irrigation and for domestic uses, the pollution of the stream above the ditch is a private nuisance.²

¹27 Cal. 476; and see s. c. 32 Cal. 166.

²*Cramer v. Randall*, 2 Utah, 248.

II. LIABILITY FOR DAMAGES CAUSED BY DITCHES.

§ 71. Various kinds of injuries.

It seems proper, in this connection, to consider very briefly the liabilities of ditch-owners, miners, appropriators, and other parties using waters as before described, for injuries caused or occasioned by such use to adjoining proprietors and occupants. These injuries may be of various kinds, resulting from negligence, unskillfulness, design, intentional trespass, from the methods in which the use of the water is ordinarily conducted, and the like. I shall examine these different species or types of injury separately.

§ 72. Damages caused by breaking or overflow.

First, where the injury is not intentional, nor resulting from the ordinary and constant mode of using the water, but is caused by the breaking or overflow of ditches, reservoirs, dams, and other structures, lawfully erected for the purpose of appropriating the water to legitimate uses. The doctrine is settled by the English courts that whenever a party lawfully constructs a reservoir, embankment, dam, or other artificial structure on his own land, for the purpose of catching, impounding, or retaining water, he thereby becomes an *insurer* of the safety of his adjoining or neighboring proprietors and occupants against all possible injury occasioned by his structure. He is absolutely liable to a neighboring proprietor or occupant for all injury done to the latter through a bursting or overflow of his reservoir or other structure, entirely irrespective of any negligence or want of skill in its erection or management, and even though the accident was caused by an unusual storm, flood, or other so-called "act of God." The English decisions have not been followed in all our American states. The doctrine which they establish has

been rejected by the courts of California, and pronounced entirely inapplicable to the mining and water interests of the Pacific communities. It has been settled, by a series of well-considered decisions, that ditch-owners and proprietors of similar works are only bound to use that amount of care, skill, and diligence in the erection, maintenance, and use of their reservoirs, ditches, canals, flumes, and the like, which an ordinarily prudent man uses in the management of his own affairs of the same kind and under the same circumstances. I will refer to a few of the leading cases in which this test of liability was judicially settled.

In one of the earliest of these cases the action was brought to recover damages caused by the bursting of defendant's dam, whereby the plaintiff's land was overflowed and injured. The right to recover was based upon an allegation that the dam was constructed in a careless and insufficient manner. Held, that such a claim presented a good cause of action; and if the dam was thus constructed, and the bad construction was the proximate cause of the bursting and overflow, the defendant was liable. But the court at the trial had charged the jury as follows: "If the jury believed that the dam was improperly constructed, *or that the defendant could have constructed it in a better or more substantial manner, so as to prevent its breaking*, then the defendant was liable." This charge was held to be erroneous. It presented the defendant's duty and liability in too broad a manner. The question is not what the defendant *could* possibly have done, but what discreet and prudent men should do, or *ordinarily* do, in such cases, where their own interests are to be affected.¹

Wolf v. St. Louis, etc., Co.² was a similar action, to recover damages for the overflowing of plaintiff's land through the neg-

¹Hoffman v. Tuolumne, etc., Co., 10 Cal. 413.

²10 Cal. 541.

ligent construction and use of defendant's flume. On the trial the court charged that defendant was bound, in the construction and management of its dam and flume, to use all the care which a *very* prudent owner would use under the like circumstances. This instruction was pronounced error; that the owner of a flume, ditch, reservoir, etc., is bound to use that care and caution, in the construction and management of his water-works, to prevent injury to others, which *ordinarily prudent* men use in like instances in their own affairs; and that the question of negligence in such cases must largely depend upon all the surrounding circumstances. In a similar action to recover damages from the overflowing of plaintiff's land by the breaking of defendant's dam, the defendant was held liable for negligence in building and using the dam, whereby the water overflowed the lands of the plaintiff. The court added the further most important rule governing this class of cases, that the doctrine of contributory negligence on the part of the plaintiff could not apply to an injury caused by such negligence of the defendant; that a want of reasonable care on the plaintiff's part could not be set up as a defense to such an action.¹

§ 73. Proper measure of care required.

While the English doctrine is extreme in one direction, it may well be doubted, I think, whether this rule does not go too far in the other extreme, and impose an insufficient liability upon the owners of water-works. Since these structures are necessarily dangerous to neighboring proprietors, and since the injury caused by their accidental bursting or overflow is necessarily great, it would seem just that their owners should be re-

¹Fraser v. Sears, etc., Co., 12 Cal. 556. As laying down the same general test of liability, see, also, Todd v. Cochell, 17 Cal. 98; Tenney v.

Miners' Ditch Co., 7 Cal. 335; Campbell v. Bear River, etc., Co., 35 Cal. 679; Richardson v. Kier, 34 Cal. 63, 74, and 37 Cal. 263.

quired to use all reasonably *possible* means in their construction and management to prevent accidental injuries thereby. I would venture to suggest that the rule as laid down by the trial court in the case of *Hoffman v. Tuolumne, etc., Co.*, above quoted, would be more reasonable and just to *all* the parties interested than the one finally adopted by the court. These dams, reservoirs, and other structures, in their essentially dangerous nature, have some analogy, at least, to railways, and the same test of liability might, under their respective circumstances, be appropriately applied to each.¹

It was also held by the supreme court of Nevada that a dam erected on a stream, in a manner in no wise injurious or prejudicial at the time of its erection to a mill above, but which, by reason of circumstances that could not have been anticipated, happening subsequently, and operating in connection with it, causes the water to flow back upon the mill, is not such an obstruction as to authorize its abatement, or to justify a recovery of damages against the person building it.²

¹[In the recent case of *Weidekind v. Tuolumne Water Co.*, (Cal.) 4 Pac. Rep. 415, Sharpstein, J., observed: "It was proper to instruct the jury as to the degree of care and vigilance which the law devolved on the defendant in the construction and maintenance of its dam, and that, if it neglected or failed to exercise that degree of care and vigilance, it would be liable for such damages as any one might suffer from the dam's breaking away. But when the court went beyond that, and instructed the jury that the dam was 'insufficiently and negligently constructed' unless it had gates sufficient

for a certain purpose, it charged with respect to a matter of fact. The court might as well have charged them that, if the dam was not of certain dimensions or constructed of a particular kind of material, it was insufficiently and negligently constructed. The defendant had a right to have the opinion of the jury on those questions. And we think the court erred in charging that 'it was the duty of the defendant to *constantly* examine said dam during the season of freshets.' That might depend on circumstances, and should have been left to the jury."]

²*Proctor v. Jennings*, 6 Nev 83.

§ 74. Injuries from intentional trespasses.

Secondly, where the injuries are intentional trespasses. In these instances the proprietors of the water-works are, of course, liable without regard to any question of negligence or lack of skill. The law does not permit one person, under color of a right to appropriate, divert, or use the water of a public stream, to trespass upon the lands or invade the existing rights of another party. Thus it is expressly held that the statutes of congress of 1866 and 1870 merely confirm such rights of water on the public lands as were accorded to the owners of mining and other claims by the state customs, laws, and decisions prior to their enactment. These statutes do not grant any rights *not* recognized by such local customs and laws. They do not authorize A., while engaged in constructing a ditch for water, to excavate it across the mining claim of B., which was located previously to the location of the ditch.¹ In another case a ditch conducted water from a stream over the adjacent country, crossing other small natural water-courses, the beds of which were dammed up by the embankment of the ditch, and by the fall of rain the waters of the streams became so swollen as to render it necessary to cut the embankment of the ditch in order to preserve it from injury; and the owners of the ditch cut the embankment at a point where there was no natural water-course, so that the waters were turned onto the cultivated land of the plaintiff, causing damage. Held, that the injury thereby sustained was not an act of God, but resulted from the voluntary act of the ditch-owners, and they were liable to the plaintiff for the damage. A. may not, in order to save his own property, destroy the property of B., however urgent the necessity.²

¹Titcomb v. Kirk, 51 Cal. 288;
and see, also, Henshaw v. Clark,
14 Cal. 461; Boggs v. Merced M.
Co., 14 Cal. 282, 279.

²Turner v. Tuolumne, etc., Co.,
25 Cal. 398.

§ 75. Damages from mode of construction or operation of works.

Thirdly, where the injury is not an intentional trespass, nor merely the result of negligence, but is the natural or necessary consequence of the mode in which the water-works are constructed, or in which they are ordinarily operated. In some of the instances placed in this group, the wrong may approach very nearly to an intentional trespass, while in others it may involve negligence; but, on the whole, these cases constitute a separate and distinct class. The forms of such injuries are various. One form consists in the discharge of the water, after its use, directly upon the lands of another person, or its discharge in such a place and manner that it naturally and necessarily flows down upon the lands of a neighboring proprietor. In the important case of *Richardson v. Kier*¹ the defendant Kier owned a ditch passing over and across Richardson's land. In regard to the general duty of the ditch-owner under these circumstances, the court said: "He [the ditch-owner] is bound so to use his ditch as not to injure the plaintiff's land, irrespective of the question as to which has the older right or title. He is bound to keep it in good repair, so that the water will not overflow or break through its banks, and destroy or damage the lands of other parties; and if, through any fault or neglect of his in not properly managing and keeping it in repair, the water does overflow or break through the banks of the ditch, and injure the land of others, either by washing away the soil or by covering the soil with sand, the law holds him responsible." In regard to the discharge of the water after use upon the land of an adjacent owner, the court further held: "When Kier discharged his water from his ditch above Richardson's land, in such a place that it naturally would and did flow over and upon and

¹34 Cal. 63, 74.

injure R.'s land, K. is liable for the injury so done. It is no excuse that he may have sold the water to miners, by whom it was used before it reached R.'s land and did the injury. If the miners thus contributed to the injury, and are joint tortfeasors with K., this is no defense to a suit against him." The same liability has been imposed upon the owners of water-works under like circumstances, and for similar injuries in other cases.¹

¹See *Richardson v. Kier*, 37 Cal. 263; *Blaisdell v. Stephens*, 14 Nev. 17; *Henshaw v. Clark*, 14 Cal. 461; *Grigsby v. Clear Lake W. Co.*, 40 Cal. 396. [*Waste Water*. Where a riparian owner, for the purpose of irrigation, leads water upon his land, he cannot send down the surplus upon lands lying lower than his own; at least in such a manner as to injure the lower estate. The lower lands are under a natural servitude to receive the ordinary drainage, but this burden cannot be increased by the acts of the upper proprietor. *Boynton v. Longley*, (Nev.) 6 Pac. Rep. 437. A person owning a ditch, from which water escapes upon the premises of an adjoining land-owner, cannot escape liability on the ground that such land-owner might, at a small expense, have prevented any damage by digging a ditch on his own land that would have carried off the waste water. *McCarty v. Boise City Canal Co.*, (Idaho.) 10 Pac. Rep. 623. *Changing Channel of Stream*. One who changes the course of a natural stream of water, and discharges it on his neighbor's land, is liable to the latter for damages. *Vernum v. Wheeler*, 35 Hun. 53. A person owning land abutting on a river, through which a creek flows and empties into the

river, may, as against proprietors on the other side of the river, change the channel and mouth of the creek upon his own land, and for his own protection and convenience, if, in so doing, both in the inception and execution of the work, he exercises reasonable care and caution not to injure the rights of others. If, however, the opposite bank of the river is subject to inundation and overflow in case of unusual but not unprecedented floods in the river, such change in the channel and mouth of the creek cannot rightfully be made, if thereby, in the exercise of ordinary prudence and foresight, increased danger of inundation and overflow on the opposite side of the river might be anticipated. *Railroad Co. v. Carr*, 38 Ohio St. 448. *Dams and Bulk-Heads*. A riparian owner may protect his land from a threatened change in the channel of the stream, liable to occur by reason of the washing away of his bank, and in pursuance thereof may build a bulk-head as high as was his original bank before it was washed away, and this will not deprive the opposite owner of any right, nor give him legal ground for complaint. *Barnes v. Marshall*, 68 Cal. 569, s. c. 10 Pac. Rep. 115.]

§ 76. Discharge of mining debris.

Another form of the injury, for which the courts have given the remedy of compensatory damages or of injunction, consists in such a use and discharge of the water that it naturally and necessarily flows down upon the lands of adjoining proprietors, charged with mud, sand, gravel, and other mining *debris*; which material, being thus carried and deposited upon such adjacent lands, injures or even destroys them for all beneficial uses.¹ In *Nixon v. Bear River, etc., Co.* an injunction was granted restraining the defendant from allowing the water, mud, sediment, or sand collecting in its ditch or reservoir, from flowing down into the plaintiff's garden, and ruining his crops. The court said: "The instructions refused by the court at the trial are founded upon the theory that in mineral districts of this state the rights of miners and persons owning ditches constructed for mining purposes are paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition, thus annihilating the doctrine of priority in all cases where the contest is between a miner or a ditch-owner and one who claims the exercise of any other kind of right, or the ownership of any other kind of interest. To such a doctrine we are unable to subscribe, nor do we think it clothed with a plausibility sufficient to justify us in combating it." In *Levaroni v. Miller* an injunction was granted under very similar circumstances, although the fact appeared or was found that the injury was not done by defendants maliciously or unnecessarily, but in the ordinary conduct of their business. In another type of the same injury the mud, sand, gravel, and other *debris* are discharged by the ordinary mode of use into a stream, and are carried down by the natural flow of the current, and deposited

¹*Logan v. Driscoll*, 19 Cal. 623; Cal. 367; *Levaroni v. Miller*, 34 Cal. Wixon v. Bear River, etc., Co., 24 231.

upon the lands of proprietors adjoining the stream in its lower portions, perhaps many miles below the point of discharge.¹

§ 77. Effects of hydraulic mining a public nuisance.

[Within the last few years a number of cases have been decided on the Pacific coast, in reference to the effects of the system of hydraulic mining, which threaten to interpose an effectual barrier to the further prosecution of that species of industry. These decisions are of such immediate importance that they require a somewhat extended notice. Their position, however, may first be briefly stated as follows: The discharge of sand, gravel, and other *debris* into the navigable rivers of the state, as a consequence of mining by the hydraulic process, with the effect to fill up the beds of such rivers or obstruct the course of navigation, is a public nuisance, which may be enjoined at the instance of the state on the relation of those injured; and if, as a further consequence of such operations, the sand and *debris* is deposited on the lands of riparian owners, it is a private injury, and they may also have relief by injunction. The first case of importance was that of *Woodruff v. North Bloomfield Gravel Min. Co.*, decided in the United States circuit court for the district of California in 1884.² The facts were stated as follows: The Yuba river rises in the Sierra Nevada mountains, and, after flowing in a westerly direction about twelve miles across the plain after leaving the foot-hills, joins the Feather. At the junction, within the angle of these two rivers, is situated the city of Marysville. The Feather thence runs about thirty miles,

¹ *Robinson v. Black Diamond, etc., Co.*, 50 Cal. 461, and 57 Cal. 412, s. c. 40 Amer. Rep. 118; *Woodruff v. North Bloomfield, etc., Co.*, 8 Sawy. 628, s. c. 16 Fed. Rep. 25; and see *Lockwood Co. v. Law-*

rence, 77 Me. 297; *Red River Roller Mills v. Wright*, 30 Minn. 249, 15 N. W. Rep. 167.

² 9 Sawy. 441, s. c. 18 Fed. Rep. 753.

and empties into the Sacramento. These three rivers were originally navigable for steam-boats and other vessels for more than a hundred and fifty miles from the ocean, at least as far as Marysville; the Sacramento being navigable for the largest-sized steamers. The defendants have for several years been and they are still engaged in hydraulic mining, to a very great extent, in the Sierra Nevada mountains, and have discharged and are discharging their mining *debris*,—rocks, pebbles, gravel, and sand,—to a very large amount, into the head-waters of the Yuba, whence it is carried down, by the ordinary current and by floods, into the lower portions of that stream, and into the Feather and the Sacramento. The *debris* thus discharged has produced the following effects: It has filled up the natural channel of the Yuba above the level of its banks, and of the surrounding country, and also of the Feather below the mouth of the Yuba, to the depth of fifteen feet or more. It has buried with sand and gravel, and destroyed, all the farms of the riparian owners on either side of the Yuba, over a space two miles wide and twelve miles long. It is only restrained from working a similar destruction to a much larger extent of farming country on both sides of these rivers, and from in like manner destroying or injuring the city of Marysville, by means of a system of levees, erected at great public expense by the property owners of the county, and inhabitants of the city, which levees continually and yearly require to be enlarged and strengthened to keep pace with the increase in the mass of *debris* thus sent down, at a great annual cost, defrayed by means of special taxation. It has polluted the naturally clear water of these streams so as to render them wholly unfit to be used for any domestic or agricultural purposes by the adjacent proprietors. It has, to a large extent, filled the beds and narrowed the channels of these rivers, and the navigable bays into which they flow, thereby lessening and injuring their navigability, and impeding and en-

dangering their navigation. All these effects have been continually increasing during the past few years, and their still further increase is threatened by the continuance of the defendants' said mining operations. On this state of facts it was held that the acts complained of, unless authorized by some law, constituted a public and private nuisance, and might be enjoined.

The defendants, first seeking the support of legislation for their acts, alleged that both congress and the legislature of California had authorized the use of the navigable waters of the Sacramento and Feather rivers for the flow and deposit of mining *debris*; and, having so authorized their use, all the acts complained of were lawful, and the results of those acts could not, therefore, be a nuisance, public or otherwise. "It is not pretended," said the court, "that either congress or the legislature of California has anywhere, in express terms, provided that the navigable waters of the state may be so used, but this authority is sought to be inferred from the legislation of both bodies, recognizing mining as a proper and lawful employment, and encouraging this industry, knowing that mining of the kind complained of could only be carried on successfully by discharging the *debris* into the streams in the mining regions, which must, from the necessity of the case, find its way into the navigable waters of the state. As to congress, it might be sufficient to say that it has no authority whatever to say what shall or what shall not constitute a nuisance within a state, except so far as it affects the public navigable waters, and interferes with foreign or interstate commerce, or obstructs the carrying of the mails. Under its authority to regulate commerce between the states, and to establish post-roads, congress may doubtless declare and punish as such the obstruction of the navigable waters of the state, as a nuisance to interstate and foreign commerce, but there its authority ends. The necessary results of the acts complained of clearly constitute a public and private nuisance, both

at common law and within the express language of the Civil Code of California." The court then proceeded to show that these acts were neither authorized nor justified by the act of congress of 1866, recognizing and regulating mining on the public lands of the United States; nor by the river and harbor bills of 1880 and 1882, for the improvement of the navigable rivers of California, although these acts recognize the injuries above described as existing facts; nor by the legislation of California regulating mining operations, or purporting to permit the condemnation of lands for the use of miners, (Code Civil Proc. § 1238, sub. 5;) nor by the act of 1878, concerning the Sacramento and San Joaquin rivers, and recognizing the injuries above described from the mining *debris*. And the court took occasion to remark that congress would have no power, even by express statute, to authorize a public nuisance destroying or materially obstructing the navigability of the streams within a state, for purposes wholly unconnected with the subjects of commerce or post-roads. Further, if there were any statute of the state of California expressly authorizing the acts of the defendants, and the injuries caused by them, it would be in conflict with the fourteenth amendment of the constitution of the United States, and with similar provisions in the organic law of the state. Such legislation would either deprive the complainant and others of their property without due process of law, or would take or damage their property for an alleged public use without compensation. The defendants were therefore stripped of all color of statutory authority for their wrongful acts.

But the defendants further claimed a right to do the acts complained of by prescription. The court, however, showed very conclusively from the authorities that there can be no such thing as a right to commit or continue a public nuisance, acquired by prescription. "It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against

the state.”¹ The last contention of the defendants was that their acts were authorized by the customs of miners, which had been recognized and confirmed by the legislation both of the state and of congress. But the court held otherwise; showing that a custom which should authorize the acts complained of, if any such existed, would be “in conflict with the laws and constitution of the state,” and would therefore be illegal and void. Such is an outline of this important case. The opinion—an able and exhaustive statement of the law—was delivered by Judge Sawyer.

The next of the cases to which we have referred, and one of equal importance, is that of *People v. Gold Run Ditch & Min. Co.*, in the supreme court of California, 1884.² We give the statement of facts in the language of the court: “The record of the case shows that the Gold Run Ditch & Min. Co. has been since August, 1870, a corporation existing under the laws of the state of California, for the purpose of mining by the hydraulic process, and selling water to miners and others; and that it is now, and its predecessors have been for several years last past, in possession of five hundred acres of mineral land, situated adjacent to the North Fork of the American river, and of certain mines on said land, which it works by the hydraulic process. The natural surface of this land lies about one thousand feet above the river; and all the material of the mines upon the land—consisting of about twenty million cubic yards of material, composed mostly of sand, gravel, small stones, cobbles, and bowlders, mixed with small particles of gold—is capable of being worked off into the river. For the purpose of mining this tract of land by the hydraulic process, the company has conducted to its mines, by means of ditches and iron pipes, a large quantity of water, which it uses, and will continue to use, un-

¹Citing *Wood, Nuis.* 790-792; *Cooley, Torts*, 613. ²⁴*Pac. Rep.* 1152.
(124)

der a vertical pressure of several hundred feet, discharging water through 'Little Giants' and 'Monitors,' and dumping all the tailings from its mines into the river. In that manner it has been carrying on its mining-operations upon said land for about eight years last past; and up to the time of commencing this action, and during about five months of each year of said period, has been daily discharging into the said river between four and five thousand cubic yards of solid material from its said mine, to-wit, of bowlders, cobbles, gravel, and sand, making a yearly discharge of at least six hundred thousand cubic yards, and will continue to discharge that quantity annually if the working of said mine be permitted to continue, and at such rate it will require some thirty years to mine out and exhaust said mineral land. Of the material thus discharged into the river a large portion has been washed, from the place of discharge or dump, down the river, and, commingled with tailings from other hydraulic mines, and still other material which is the product of natural erosion, has been deposited in the beds and channels of the American and Sacramento rivers and their confluent, but mostly in the American, and upon lands adjacent to both rivers. The deposits of this material upon the beds and along the channels of the rivers, and through the Suisun bay, and into the San Pablo and San Francisco bays, have already filled and raised the beds of both rivers. The bed of the American has been raised from ten to twelve feet, and in some places more, and the bed of the Sacramento, to a great extent below the mouth of the American, from six to twelve feet. In consequence, the beds of the two rivers have shallowed, and their channels widened, so that the depths of the rivers have greatly lessened, and their liability to overflow has been materially increased, causing the frequent floods to extend their area, and to be more destructive than they otherwise would have been, and covering thousands of acres of good land in the Sacramento valley with mining *de-*

bris. And as the rivers are at all times carrying in suspension the lighter earthy matter from the mines, and washing down the heavier *debris*, they are likely to fill more rapidly in the future in proportion to the quantity of hydraulic tailings than in the past, and to cause much further and greater injury in the future to large tracts of land; probably rendering them, within a few years, unfit for cultivation and inhabitancy. Besides, the discharge from the mines so fouls the water of the American river at all points below as to make it unfit for any domestic use by the inhabitants. And, from the same cause, the navigation of the Sacramento river has been so greatly impaired that the river, which, until the year 1862, was navigated as far as the city of Sacramento without difficulty by steamers of deep draught, to-wit, by boats drawing nine or ten feet of water, has been, since the year 1862, innavigable as far as the city of Sacramento by boats of deep draught, except during high water, instead of at all times, as formerly. And there is imminent danger, if the acts of the defendant and others engaged in hydraulic mining are allowed to continue, that the beds and channels of the lower portion of the American river, and of the Sacramento river below the mouth of the American, will be so filled and choked up by tailings and other deposits that said rivers will be turned from their channels, cutting new water-ways, injuring or destroying immense tracts of land, and probably will result in greatly impairing the navigability of the Sacramento river."

The court held that a perpetual injunction against the hydraulic operations of the defendant was rightly issued, inasmuch as the acts complained of constituted a public nuisance. "As a navigable river," said McKee, J., "the Sacramento is a great public highway, in which the people of the state have paramount and controlling rights. These rights consist chiefly in a right of property in the soil, and a right to the use of the

water flowing over it, for the purposes of transportation and commercial intercourse. The soil of a navigable river is the *alveus* or bed of the river; the river itself is the water flowing in its channel. An unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance; and an unauthorized encroachment upon the soil itself is known in law as a purpresture. * * * Great water highways belong to the same-class of public rights, and are governed by the same general rules applicable to highways upon land. Any contracting or narrowing of a public highway on land is a nuisance, and all unauthorized intrusions upon a water highway for purposes unconnected with the rights of navigation or passage are nuisances. * * * To make use of the banks of a river for dumping places, from which to cast into the river annually 600,000 cubic yards of mining *debris*, consisting of bowlders, sand, earth, and waste materials, to be carried by the velocity of the stream down its course, and into and along a navigable river, is an encroachment upon the soil of the latter, and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair the navigation of a river, but at the same time affect the rights of an entire community or neighborhood, or any considerable number of persons, to the free use and enjoyment of their property, they constitute, however long continued, a public nuisance. * * * But it is contended that, as the nuisance complained of, and found by the court, was the result of the aggregate of mining *debris* dumped into the stream by the defendant and other mining companies, acting separately and independently of each other, the acts of the defendant cannot be joined with the acts of other mining companies to create a cause of action against the defendant."

But the court, upon a review of the authorities, found this last position untenable. Reference was made to the case of

Hillman v. Newington, 57 Cal. 62, and it was said: "This case clearly recognizes the equitable principle that, in an action to abate a public or private nuisance, all persons engaged in the commission of the wrongful acts which constitute the nuisance may be enjoined jointly or severally. It is the nuisance itself which, if destructive of public or private rights of property, may be enjoined." The court continued: "But it is also claimed that the defendant has acquired the right from custom, and by prescription and the statute of limitations, to use the American and Sacramento rivers as outlets for its mining *debris*; and that, in the exercise of this right, it cannot be restrained in its business of hydraulic mining, notwithstanding the consequent injuries to those rivers. Undoubtedly the fact must be recognized that in the mining regions of the state the custom of making use of the waters of streams as outlets for mining *debris* has prevailed for many years; and, as a custom, it may be conceded to have been founded in necessity, for without it hydraulic mining could not have been economically operated. In that custom the people of the state have silently acquiesced, and, upon the strength of it, mining operations, involving the investment and expenditure of large capital, have grown into a legitimate business, entitled, equally with all other business pursuits in the state, to the protection of the law. But a legitimate private business, founded upon a local custom, may grow into a force to threaten the safety of the people, and destruction to public and private rights; and, when it develops into that condition, the custom upon which it is founded becomes unreasonable, because dangerous to public and private rights, and cannot be invoked to justify the continuance of the business in an unlawful manner. Every business has its laws, and these require of those who are engaged in it to so conduct it as that it shall not violate the rights that belong to others. Accompanying the ownership of every species of property is the corresponding duty to so use it

as that it shall not abuse the rights of other recognized owners.
 * * * As to the claim of right derived from prescription and the statute of limitations, it is sufficient to say that the right to continue a public nuisance cannot be acquired by prescription, nor can it be legalized by lapse of time. Against it, however long continued, the state is bound to protect the people; and for that purpose the attorney general, as the law officer of the state, has the power to institute a proceeding in equity, in the name of the people, to compel the discontinuance of the acts which constitute the nuisance."¹

In a later case it was held that a corporation may be enjoined upon an *ex parte* application, without notice to it, from depositing in or discharging mining *debris* into certain streams, or from selling water to others to be used for the purpose of washing, by the hydraulic process, any mineral lands into the channel of said streams or their tributaries, though the general, ordinary, and only business of such corporation is that of mining by the hydraulic process, or of selling water to others to be used for like purposes.²]

§ 78. Impounding dams.

[The hydraulic mining companies, after the decisions referred to in the preceding section, began the erection of impounding dams across the streams utilized by them, for the purpose of arresting the progress of the *debris* into the rivers below. Some discussion has arisen in regard to the sufficiency of these dams, but the courts have not yet formulated a definite rule on the subject. Keeping in mind, however, the extent of the public

¹Citing *Pettis v. Johnson*, 56 Ind. 139; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; *Wright v. Moore*, 38 Ala. 593; *People v. Cunningham*, 1 Denio, 524; *Mills v. Hall*, 9 Wend. 315; Civil Code Cal. § 3490; *Sacramento v. Central*

Pac. R. R., 61 Cal. 250; *People v. Stratton*, 25 Cal. 242; *Yolo Co. v. Sacramento*, 36 Cal. 193.

²*Eureka Lake & Yuba Canal Co. v. Superior Court*, 66 Cal. 311, 5 Pac. Rep. 490.

and private interests which are jeopardized by the system of hydraulic mining, they have held that no dam for impounding mining *debris*, erected in a mountain river, should be held sufficient to protect riparian and other proprietors below, upon any evidence not of the most unquestionable and satisfactory character. "It is for the pecuniary interest of hydraulic miners," says Judge Sawyer, "to get out as much of the precious metals as possible, with the least possible expense. The interests of the moving party in this matter are simply to tide over the present, and escape injunctions until its mines can be worked out. What happens afterwards is no concern of its. As human nature is constituted, the action of parties so situated, set in motion by an application of the coercive powers of the law, in the erection, at their own expense, and according to their own ideas, of impounding dams for the sole protection of the rights of those upon whom they commit trespasses, should be scrutinized with jealous care by those who administer the laws, and whose imperative duty it is to see that each man shall so use his own as not to injure his neighbor. It may well be doubted whether any restraining dam, however constructed, across the channels of the main mountain rivers, of a torrential character, should be accepted by the courts as a sufficient protection to the occupants of land in the valleys below liable to be injured. But, if any are to be accepted, they should only be those the ample sufficiency of which has been established upon testimony of the most unquestionable and satisfactory character. Nothing should be left to conjecture. This is not a matter of a single dam. A rule must be laid down applicable to the entire gold-bearing region. It will be no use to restrain one mine, if others are allowed to run. Besides, it would be unjust. All doing injury must be stopped or restrained from contributing to further injury, or none."¹]

¹Hardt v. Liberty Hill Min. Co., 27 Fed. Rep. 788.

III. EXTENT OF THE RIGHT ACQUIRED.

§ 79. Amount of water which the appropriator is entitled to use.

The amount of water which an appropriator is entitled to use—commonly designated as the *extent* of his appropriation—is a question of fact to be determined by a jury. The right of the prior appropriator in this respect is limited to the amount or extent of his actual appropriation, as against subsequent appropriators and claimants; and he cannot, after *their* subsequent rights have attached, by changing the place or nature of his use, or by enlarging his works, or otherwise, extend his claim, or increase the amount of water diverted or used, to the prejudice of such subsequent parties.¹ The extent of the appropriation and amount of water thereby taken may be determined by the special purpose for which the appropriation was made; and in such a case the appropriator is entitled to so much water only as is necessary for that purpose; a change of the purpose which would increase the amount of water diverted would not be permitted as against subsequent claimants.² Thus, in the case of *Nevada W. Co. v. Powell*, cited below, it was held that where the plaintiff had appropriated a portion of the water of a stream, and had made a dam and ditch amply sufficient for his purpose, and had thereby acquired the right to use such portion only of the water, and in such manner only, he cannot encroach upon the rights of subsequent appropriators by extending his use beyond the first appropriation. By the plaintiff's erections and use for

¹*Nevada W. Co. v. Powell*, 34 Cal. 109; *Ortman v. Dixon*, 13 Cal. 33; *Higgins v. Barker*, 42 Cal. 233; *Davis v. Gale*, 32 Cal. 26; *Lobdell v. Simpson*, 2 Nev. 274; *Barnes v.*

Sabron, 10 Nev. 217; *Atchison v. Peterson*, 20 Wall. 514.

²*Nevada W. Co. v. Powell*, 34 Cal. 109; *McKinney v. Smith*, 21 Cal. 374; *Barnes v. Sabron*, 10 Nev. 217.

several years, other persons had a right to suppose that he had thereby defined and determined his own rights as to amount of water, and to act accordingly by appropriating the surplus to their own uses. On the other hand, if a prior appropriation has been made of a certain amount or quantity of the water, independently of any *particular* use or purpose, the appropriator may afterwards, as against subsequent claimants, change either the place or the nature of his use, provided such change does not increase the amount of water diverted and used.¹

§ 80. Carrying capacity of ditch.

Where the prior appropriation extends to all the water flowing in the stream at the point of diversion, the appropriator may enlarge his ditch at pleasure, and so increase the amount actually diverted, and other parties whose claims to the stream are subsequent cannot complain of such enlargement.² Where the prior appropriation extends only to a portion of the stream, and

¹Davis v. Gale, 32 Cal. 26; Kidd v. Laird, 15 Cal. 161; Woolman v. Garringer, 1 Mont. 535. [Where a party has appropriated water for the purpose of irrigation, the amount of water to which he is entitled, as against subsequent appropriators, is limited to the amount actually applied to the purposes of irrigation. Simpson v. Williams, 18 Nev. 432, s. c. 4 Pac. Rep. 1213. The grantee of an undivided half of a sufficiency of water for a certain purpose takes by his grant no more than one-half of the whole quantity of water in the stream, whenever such quantity is, by natural causes, diminished below such sufficiency. Dow v. Edes, 58 N. H. 193. The diversion of water from a natural

stream, on the part of one who has conducted some water to it, will be restrained at the suit of a riparian proprietor, unless the former shows that he has not diverted from it more water than he led to it. Wilcox v. Hausch, 64 Cal. 461, s. c. 3 Pac. Rep. 108. The prior appropriator of water has the prior right to its use to the extent, in amount and time, of his first appropriation, and (it seems) to the extent to which he was preparing to use it. Lehi Irrigation Co. v. Moyle, (Utah,) 9 Pac. Rep. 867.]

²James v. Williams, 31 Cal. 211. In Feliz v. City of Los Angeles, 58 Cal. 73, it was held that the city had acquired a right to all the water of a river, and that plaintiff's use was permissive, not adverse.

is determined by the amount actually diverted, the measure of such appropriation and of the appropriator's right seems to be the quantity of water which could actually be carried by his ditch in the size and condition in which it was when the subsequent appropriation above him on the stream was made. The rule under these circumstances is thus stated by the supreme court of California: "He is entitled to have the water [of the stream flowing down to his ditch] undiminished in quantity, so as to leave sufficient *to fill his ditch* as it existed at the time the subsequent appropriations above him were made."¹ The supreme court of Nevada has formulated the rule in somewhat more precise terms: "It seems that the quantity of water appropriated is to be measured by the capacity of the ditch or flume at its smallest point; that is, at the point where the least water can be carried through it."²

§ 81. True capacity of ditch the proper measure.

It may well be doubted, I think, whether there is any material difference between these two modes of expressing the rule. But the *actual* physical condition of the ditch at the time the use of the water by its means began, and during some period of time after such commencement, and the amount of water *actually* diverted and carried by it at and during these times, do not always

¹Bear River, etc., Co. v. New York M. Co., 8 Cal. 327.

²Ophir Silver M. Co. v. Carpenter, 6 Nev. 393; 4 Nev. 534. Also in Barnes v. Sabron, 10 Nev. 217, the court held that where the prior appropriator of a stream has constructed ditches in order to irrigate his land, if the capacity of his ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purposes of irriga-

tion, of watering his stock, and of domestic uses; but if the capacity of his ditches is not more than sufficient for those purposes, then, under the facts of this case, no change having been made in the ditches since their construction, and no question as to the right of their enlargement being involved, he must be restricted to the capacity of his ditches at their smallest point.

furnish an inflexible test or measure of the extent of the appropriator's right. The ditch might be so imperfectly constructed, with irregular and improper grades, and with incomplete excavation, that it could not actually carry so large an amount of water as its general plan and size rendered it capable of carrying, and as its proprietor had intended to appropriate. Under these circumstances, unless the use of the ditch had continued so long a time as to show an intention of the appropriator to adopt it in its existing imperfect condition, the proprietor would be entitled to perfect his ditch by removing obstructions, improving the grades, and the like, so that it could actually carry the amount of water indicated by its general size and character, and originally intended to be appropriated; and the increase in the actual flow of water thus caused would not be an invasion of the rights of subsequent appropriators, although their rights accrued before the improvements were made. The case of *White v. Todd's Valley W. Co.*¹ arose out of such circumstances. The defendants had made a ditch for mining purposes; and the plaintiff afterwards made a ditch, taking water from the same stream. The plaintiff complained because the defendants had enlarged their ditch, after the plaintiff's appropriation, and had thereby caused a diversion of a greater amount of water, to the plaintiff's injury, and prayed for an injunction. The court held that the defendants were not restricted to the amount of water *actually* taken by their ditch at the very beginning of its use, unless by its general plan, size, and grade it was not capable of carrying more water than was then actually taken by it. If by reason of obstructions in the ditch, or irregularity of its grade at that time, it was not capable at first of taking so much water as its general plan and size would indicate, the defendants would have a reasonable time within which to remove such obstructions or to adjust the grades, and could then divert the water

¹ 8 Cal. 443.

to the full capacity of the ditch. But if the defendants continued to take only the original quantity of water long enough to indicate an intent to divert *only that amount*, or if they delayed for an unreasonable time to remove the obstructions or regulate the grades, then they would be restricted to the amount thus actually taken at first, and the plaintiff would be entitled to all the residue. The rule laid down by this decision is plainly confined, in its scope and operation, to the very special circumstances above described; it can hardly be regarded as furnishing any *general* test or measure of the amount included in a prior appropriation. A few other cases, which deal only with questions of fact as to the amount of water appropriated, are cited in the foot-note.¹

IV. SUCCESSIVE APPROPRIATORS.

§ 82. Rights of subsequent appropriator.

In the previous sections, which particularly describe the mode of effecting a prior appropriation, the rights of the prior appropriator, and the amount of water included within a prior appropriation, the relations of the subsequent appropriators, and especially the limitations or restrictions upon their rights growing out of the superior claims of the prior appropriator, have necessarily been involved and stated. I shall not repeat the discussions of these previous sections, and reference must be made to them in order to obtain a full view of the relations subsisting between the prior and the subsequent appropriators, and the limitations placed upon the rights which can be acquired by the latter parties. In the present section I purpose to describe the *affirmative* rights, which may be obtained and held by subsequent and successive appropriators, to divert and use

¹Higgins v. Barker, 42 Cal. 233; Stein Canal Co. v. Kern Island Co., Reynolds v. Hosmer, 51 Cal. 205; 53 Cal. 563.
Dougherty v. Haggin, 61 Cal. 305;

the waters of a public stream which have already been appropriated by the prior acts of another party.

§ 83. Successive appropriations.

Whenever a certain person, A., has made a prior appropriation at a certain point on a stream, even though of the whole amount of water, it has already been shown that another party, B., may make a subsequent appropriation at a place higher up on the stream, may divert and use the waters, and return them, undeteriorated in quality and undiminished in quantity, into the natural channel of the stream above the head of A.'s ditch, and no right of A.'s would thereby be infringed, because his use of the water would not be in any way interfered with.¹ This particular case is simply an instance of the following general doctrine, which has been firmly settled by numerous decisions:

A prior appropriation having been made on a public stream, the residue or surplus remaining of its waters, not embraced within the amount of such prior appropriation, may afterwards be appropriated, either above or below on the same stream, by other parties, if no interference with the rights of the prior appropriator is thereby caused. The doctrine extends to and admits of a succession of such appropriators; and there is no limit to its operation, except such physical limits as arise from the size of the stream itself and the amount taken by each claimant. Among the successive appropriators, each is in the position of a prior one towards all who are subsequent to himself.² This gen-

¹See *ante*, § 55.

²*Stein Canal Co. v. Kern Island, etc., Co.*, 53 Cal. 563; *Broder v. Natoma W. Co.*, 50 Cal. 621; *Smith v. O'Hara*, 43 Cal. 371; *Higgins v. Barker*, 42 Cal. 233; *Nevada W. Co. v. Powell*, 34 Cal. 109; *Davis v. Gale*, 32 Cal. 26; *Hill v. Smith*, 27 Cal. 476; *American Co. v. Brad*

ford, *Id.* 361; *McKinney v. Smith*, 21 Cal. 374; *Ortman v. Dixon*, 13 Cal. 33; *Butte C. Co. v. Vaughn*, 11 Cal. 143; *Kelly v. Natoma W. Co.*, 6 Cal. 105; *Lobdell v. Simpson*, 2 Nev. 274; *Proctor v. Jennings*, 6 Nev. 83; *Barnes v. Sabron*, 10 Nev. 217.

eral doctrine has been stated in the following modes by different decisions: "In controversies between prior and subsequent appropriators of water, the question is, has the use and enjoyment of the water, *for the purposes for which the first appropriator claims it*, been impaired by acts of the subsequent claimant?"¹ A decree prohibiting a party situated on a stream below the dam at the head of a ditch belonging to another person from diverting or interfering with the water *above* such dam, does not hinder him from using the surplus water which flows down the stream after the ditch is supplied.² The surplus water of a stream, after a prior appropriation, may be the subject of a new appropriation, and the second appropriator will have a paramount right to use all the waters which are not required for the special purposes of the prior appropriator.³ If a prior appropriator of water for mill purposes suffers a portion of the water, or the whole amount of it, after driving the mill, to flow down its accustomed channel, other parties below him on the stream may appropriate this residuum, so as to obtain a vested right to its use.⁴ In *Lobdell v. Simpson*⁵ the doctrine was briefly but comprehensively stated: "A second appropriator has a right to have the water continue to flow as it flowed when he made his appropriation." The same court said, in *Proctor v. Jennings*:⁶ "A person appropriating a water-right on a stream already appropriated acquires a right to the surplus or residuum which he appropriates; and those who hold the prior rights, whether above or below him on the stream, can in no way change or extend their use of the water to his prejudice, but are limited to the rights enjoyed by them when he secured his own."

¹ *Hill v. Smith*, 27 Cal. 476.

² *American Co. v. Bradford*, 27 Cal. 361.

³ *McKinney v. Smith*, 21 Cal. 374.

⁴ *Ortman v. Dixon*, 13 Cal. 33.

⁵ 2 Nev. 274.

⁶ 6 Nev. 83.

§ 84. Periodical appropriations.

It makes no difference in the application of this doctrine how the surplus or residue of the water may arise. It may be constant, resulting from an appropriation of a portion only of the water; or it may be intermittent, resulting from an appropriation of all the water during only a part of the time. If a prior appropriation is of such a character that it only takes and uses the water on certain days of the week or month, a second appropriator may acquire a vested and paramount right to the same amount of the water flowing through the stream on the other days not embraced in the prior claim. A. having appropriated the entire water of a stream to be used only on Mondays, Tuesdays, and Wednesdays, B. may subsequently acquire an equally perfect right to use the same quantity of the water on Thursdays, Fridays, and Saturdays.¹ This rule is stated in the Nevada case in the most general terms: "If the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person may not only appropriate a part or the whole of the residue, and acquire a right thereto as perfect as that of the first appropriator, but he may also acquire a right to the quantity of water used by the first appropriator at such times as it is not needed or used by him."

§ 85. Conditions under which subsequent appropriation may be effected.

The rights of the subsequent appropriator conferred and protected by this doctrine may exist and be exercised under the following different conditions of fact: (1) A subsequent appro-

¹Smith v. O'Hara, 43 Cal. 371; Barnes v. Sabron, 10 Nev. 217; and see Lytle Creek W. Co. v. Perdew, 2 Pac. Rep. 732. [Where a landowner appropriates and uses all the water of a stream, except dur-

ing extraordinary high water or freshets, he cannot obtain an injunction against appropriation by another of the surplus water during freshets. Edgar v. Stevenson, (Cal.) 11 Pac. Rep. 704.]

priator may always take and use *any* amount of water at a place higher up the stream than the point of the prior appropriation, and without any reference to the amount embraced in such prior appropriation, provided he returns all the water after its use, undeteriorated in quality, to its natural channel in the stream, before it reaches the prior appropriator's place of diversion,—the head of his ditch; since under these circumstances the prior appropriator is in no manner injured. (2) When a prior appropriation includes only a certain portion of the water flowing in a stream,—measured, for example, by the capacity of the ditch,—a subsequent appropriator, at a place higher up on the stream, may always take from the stream, use, and consume, without returning, any quantity of its water, provided he leaves flowing down the natural channel after his own diversion a sufficient amount of the water at all times to meet the demands of the prior appropriation; in other words, so as not to lessen nor interfere with the amount which the prior appropriator is entitled to draw off by his means of diversion. (3) When a prior appropriator takes and uses the whole or any portion of the water of a stream, for milling or other similar purposes, by which the water is not consumed, and then after such use returns the water to the stream so that it thenceforth flows down its natural channel, a subsequent appropriator lower down the stream may appropriate and obtain a vested right to the whole or any part of the same water so discharged and flowing down the natural channel after its former use. (4) When a prior appropriator takes and uses a certain portion or quantity of the water from a stream, and by the nature of his use consumes the same without restoring it or any part of it to the stream, then the surplus or residue of the stream not so diverted but continuing to flow down the natural channel, or any part thereof, may be subsequently appropriated by another party lower down the stream, and his rights of appropriation in such surplus or residue will

be vested and perfect. (5) In all these conditions, a subsequent appropriator may appropriate and obtain a vested right to use the water during the fixed intervals of time when it is not taken and used by the prior appropriation. All the possible cases which can arise may be accounted for and explained by a combination among the foregoing general conditions of fact. Whenever successive appropriations have been properly and lawfully made on the same stream, each party is, with respect to the extent of his appropriation,—the amount included therein,—in the legal position of a prior appropriator towards all the others.¹

§ 86. Division of increase in stream.

In addition to the general doctrine thus stated and illustrated, the following special rules, applying to particular circumstances, have been the subject-matter of decision. If two persons successively appropriate water of a stream by means of their ditches, and a third person turns into the same stream, at a place higher up than the heads of both these ditches, additional water brought by means of his own ditch from another and different stream, without any intention of recapturing the same, the water thus discharged becomes *publici juris*,—to all intents a part of the natural waters of the stream into which it is emptied; and it belongs to the two appropriators according to their priority of right,—the one having made the prior appropriation is first entitled to the increased flow to the extent of his appropriation.²

A person who had located a mill-site on a stream, and appropriated the water for the purposes of his mill, sold and conveyed all his interest in the water of the stream to the proprie-

¹[Where old ditches are superseded by agreement by a new one, and nothing is said in regard to the division of the water, the rights of the parties are to be determined according to their original appro-

priations, and not according to their interests in the new ditch. *Rominger v. Squires*, (Colo.) 12 Pac. Rep. 213.]

²*Davis v. Gale*, 32 Cal. 26.

tor of a ditch above him. Held, that he had not thereby lost his prior right to the water which still flowed down the stream after such sale, as against a third party who had appropriated the water below him subsequently to his original appropriation, but before his said sale and conveyance.¹

§ 87. Wrongful diversion of springs.

In the case of *Strait v. Brown*² the supreme court of Nevada decided a point which may be of much practical importance. Although no distinction, in general, exists between waters running under the surface in defined channels, and those running in such channels upon the surface; and although water percolating through the ground below the surface is not governed by the same rules which pertain to running streams,—still, subsequent appropriators cannot, as against the prior appropriator of the same stream, lawfully acquire rights to the waters of the *springs* which constitute the source of such stream, simply because the means through which the waters are conveyed from the springs to the stream are subterranean, and not well understood nor defined. In other words, the subsequent appropriators on a stream cannot cut off and destroy or impair the rights of the prior appropriators by tapping the very springs themselves which constitute the sources of the stream, under color of a right to reach subterranean and percolating waters.³

V. ABANDONMENT OF RIGHT.

§ 88. General doctrine of abandonment.

Many of the cases heretofore cited, and several of the rules formulated in the foregoing sections, recognize the fact that

¹*McDonald v. Askew*, 29 Cal. 200.

²16 Nev. 317.

³For further special applications, see *Nevada W. Co. v. Powell*, 34 Cal. 109; *Reynolds v. Hosmer*, 51

Cal. 205. The particular facts and rulings in these cases have been sufficiently described under previous sections.

there may be an abandonment of the exclusive right to divert and use water acquired by or resulting from a prior appropriation; that such an abandonment may be made either after the prior appropriation has become perfect and complete, and the right under it vested, or while it is yet imperfect and incomplete, and the right under it remains inchoate; and, finally, that an abandonment may be express and immediate, by the intentional act of the appropriator, or may be implied from his neglect, failure to use due diligence in the construction of his works, non-user of them after completion, and the like. The general doctrine concerning the effect of such an abandonment, at whatever time or in whatever manner made, is well settled. The prior appropriator thereby loses all of his exclusive rights to take or use the water which he had acquired, or might have acquired, by his appropriation; and he cannot, after an abandonment, reassert his original right to the same, or the same amount of water, as against a second or other subsequent claimant who has taken proper steps to effect an appropriation thereof. If there has been no subsequent appropriation of the water thus abandoned, by another party, the prior appropriator may, of course, regain his former right, but this can only be done by his properly commencing and completing *de novo* the requisite steps in order to effect an appropriation, as heretofore described. He is in exactly the same situation as though he had hitherto made no attempt to appropriate the water.¹

§ 89. Methods of abandonment.

The methods in which an abandonment may be accomplished are various. Since the right held by the appropriator is an in-

¹Davis v. Gale, 32 Cal. 26; Barkley v. Tieleke, 2 Mont. 59; and see cases cited *ante*, concerning the mode of making an appropriation,

due diligence in completing the works, etc.; and concerning the discharge of water into the stream without intent of "recapture."

terest in land, an incorporeal hereditament, it can only be transferred, as has already been shown, by an instrument in writing sufficient to convey real estate. It follows that a mere verbal sale and transfer of his water-right by a prior appropriator operates *ipso facto* as an abandonment thereof.¹ Such act shows an unequivocal intent on the part of the appropriator to give up and relinquish all of his interest, and, as it does not effect any transfer thereof to the attempted assignee or vendee, the only possible result is an immediate and complete abandonment. The same result follows from an attempted transfer of the water-right by means of an imperfect deed or instrument of conveyance.² Returning the water, which has been diverted back into the natural channel of the stream without the intent of "recapturing" it, would be an express abandonment of all further rights to the use of such water; and the absence of any intent to "recapture" would generally be inferred, it seems, unless the returning of the water, after its first diversion, was made for the purpose of using the natural channel as a part of the appropriator's ditch or canal.³ Again, an abandonment may be inferred from a neglect to use the water for an unreasonably long time, especially if the special purposes of its original appropriation had been fully accomplished. Thus, in an important case already quoted, the court, after saying that the prior appropriator of water for a particular mine may, when he has worked out and abandoned said mine, extend his ditch and use the water at other points, without losing his priority, further held that, where

¹ Smith v. O'Hara, 43 Cal. 371.

² Barkley v. Tieleke, 2 Mont. 59. In both these instances, as has already been shown, no interest *passes* to the transferees; they do not succeed to any *priority* held by their assignor; their rights of priority date only from the time of their own possession and user.

³ Woolman v. Garringer, 1 Mont. 535; Davis v. Gale, 32 Cal. 26; Butte Canal Co. v. Vaughn, 11 Cal. 143. [A party cannot reclaim water that he has used and then allowed to pass from his control. Eddy v. Simpson, 3 Cal. 249; and see Schulz v. Sweeny, (Nev.) 11 Pac. Rep. 253.]

water had been appropriated for a particular purpose, and that purpose had been accomplished, the appropriators dispersed and allowed a long time to elapse without making any use of the water under their appropriation, and finally sold the ditch to other parties for a nominal sum, all these facts were sufficient evidence of an abandonment by them; in other words, an abandonment of their prior appropriation might be inferred from such conduct. The court further held that, when a party has abandoned his prior appropriation, he cannot, by a sale and conveyance, revive his prior rights in favor of his grantees, even though the sale is *bona fide* on their part.¹ On the other hand, the mere suspension of work in constructing a ditch for a limited and reasonable time would not necessarily be an abandonment of the appropriator's inchoate right.² It has already been shown in a previous section that one who has given notice of his intention to appropriate the water of a certain stream, must commence and prosecute his works unto completion with due and reasonable diligence, in order to perfect his exclusive right by appropriation. It seems to follow from this affirmative proposition that a neglect or failure on his part to use the due and reasonable diligence so required in constructing his works, must necessarily amount to an abandonment of the intended appropriation, and of all rights which could have been acquired by its means.³

¹Davis v. Gale, 32 Cal. 26. [In Lowden v. Frey, 67 Cal. 474, s. c. 8 Pac. Rep. 31, the court said: "The testimony tends to show that the appropriation of the water by the defendants and their grantors was for mining purposes generally, to be used at various points. Under such circumstances, the position of the plaintiff, that 'the right to the use of water for mining pur-

poses ceases with the exhaustion of the mine for which it was appropriated,' has no application." It is not stated what would be the effect if the water were appropriated for use in one particular mine, and that mine became exhausted.]

²Atchison v. Peterson, 1 Mont. 561.

³See *ante*, § 52.

§ 90. Abandonment by adverse user.

[The right of the first appropriator of water on the public lands may be lost by the adverse possession of another; and when such other person has had the continued, uninterrupted, and adverse enjoyment of the water, or of some certain portion of it, for a sufficient length of time, the law will presume a grant of the right so held and enjoyed by him.¹ A failure to use for a time is competent evidence of abandonment; and if such non-user continues for an unreasonable period it may fairly create a presumption of intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory proofs.² Thus where, in an action to try the title to a certain water-right, the defendant denied plaintiff's alleged ownership, and set up title by adverse possession, the plaintiff, after proving prior appropriation in himself, might, in order to defeat the defense of the statute of limitations, show in rebuttal that the defendant, before any bar of the statute had attached, had acknowledged the plaintiff's claim, and endeavored to lease the said water-right from the plaintiff.³]

VI. REVIEW OF THE SYSTEM.**§ 91. This system as a whole.**

The foregoing summary of doctrines and rules presents the system of water-rights, based upon prior and subsequent appropriations of streams and lakes situated within the public do-

¹Union Water Co. v. Crary, 25 Cal. 504; Smith v. Logan, 18 Nev. 149. Five years' adverse possession is sufficient to bar an action to enforce a water-right. Evans v. Ross, (Cal.) 8 Pac. Rep. 88. It is held in Oregon that non-user works no abandonment, unless continued long enough to give a

title to realty under the statute of limitations. Dodge v. Marden, 7 Or. 456.

²Sieber v. Frink, 7 Colo. 148, s. c. 2 Pac. Rep. 901. And see Dorr v. Hammond, 7 Colo. 79, s. c. 1 Pac. Rep. 693.

³Ledu v. Jim Yet Wa, 7 Pac. Rep. 731.

main, or lands belonging to the United States, as that system has been built up by judicial decisions upon the foundation of local customs recognized and ratified by the legislation of congress. It is plain, upon an examination and comparison of the special rules formulated in the preceding sections, that the system, in theory at least, furnishes all the possible protection for the rights of subsequent and successive claimants after it has once admitted that a party can, by prior appropriation, obtain a prior and exclusive right to the water of a stream or lake, limited and measured only, in its extent, by the actual needs of the particular purpose for which the appropriation is made. The system places an obstacle in the way of a prior appropriator's obtaining an exclusive control of the entire stream, no matter how large; and secures the rights of subsequent appropriators of the same stream, by requiring that a valid appropriation shall be made for some beneficial purpose, presently existing or contemplated; and by restricting the amount of water appropriated to the quantity needed for such purpose; and by forbidding any change or enlargement of the purpose, which should increase the quantity of water diverted under the prior appropriation, to the injury of subsequent claimants; and by subjecting the prior appropriation to the effects of an abandonment, by which all prior and exclusive rights once obtained would be lost. By these means, a party is, in theory at least, prohibited from acquiring the exclusive control of a stream, or any part thereof, not for present and actual use, but for future, expected, and speculative profit or advantage. In other words, a party cannot obtain the monopoly of a stream, in anticipation of its future use and value to miners, farmers, or manufacturers.

§ 92. Defects of the system.

While the theory thus appears to be admirable, the practical workings of the system may be attended with some difficulties,

and they have certainly involved a great amount of litigation. When a prior appropriator has actually established himself on a stream, and is diverting its waters by ditches, an attempt to enforce the rights of a subsequent claimant may be difficult, and may require an expensive and protracted controversy. The prior appropriator is certainly placed in a position of great advantage in maintaining his own claims, even though unfounded and unlawful, against those who are seeking to enforce their subsequent and lawful rights to use the water of the stream. But the principal defect of the system, the one capable of working the greatest injustice, is inherent in the very theory itself, in its fundamental conception. This defect is the total absence of any limit to the extent of a prior appropriation,—to the amount of water which may be taken,—except the needs of the purposes for which it is made. The prior appropriator, in order to carry out a purpose regarded by the law as beneficial, of great magnitude,—such, for example, as an extensive system of hydraulic mining, or the irrigation of a large tract of farming lands, or, doubtless, the supply of a municipality,—*may* divert and consume, without returning to its natural channel, *the entire water* of a public stream, no matter what may be its size or length, or the natural wants of the country through which it flows. Furthermore, this appropriation may be made by a party who owns no land upon the banks of the stream, and for a purpose situated *at any distance* from the stream itself, far beyond the region to which the stream naturally belongs, and which would naturally receive its benefits. In this manner the *natural* benefits of a stream to the lands situated upon its bank throughout its entire length *may be* completely destroyed, and the natural rights of all persons who should afterwards settle and purchase lands adjoining the stream *may be* totally ignored, disregarded, and abrogated by such a prior appropriation.

§ 93. **Presumption that stream was on public land.**

This first branch of the discussion may be appropriately ended by the statement of an important point just decided by the supreme court of California, that, in the absence of all evidence, it will be presumed that a stream, at the time when its waters were appropriated, was a public stream, and all the lands on its banks were public lands of the United States. There had been several successive appropriations of a stream called "Lytle Creek" by different parties. The court say: "There is nothing in the pleadings or findings to indicate that, when all the waters of Lytle creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership. It must be presumed, therefore, that such lands were public lands of the United States, and the rights to the water of Lytle creek acquired by prior appropriations were confirmed by the act of congress of 1866. The court found that the settlement on government land by defendant was made after the act of 1866 took effect. Any rights which he might acquire, therefore, from the government, would be subject to the previously confirmed appropriations of the water."¹ This action was brought by a prior appropriator to restrain the defendant, a subsequent appropriator, from an alleged unlawful diversion. It appeared that there were other distinct and separate appropriators who were not parties to the suit. The court made the following important ruling concerning the necessary parties under such circumstances: "In an action by an appropriator of the water of a certain stream to restrain a defendant from diverting the same, when the court finds that the plaintiff has a separate title to the use of *all* water for a certain length of time out of a longer period, (namely, 'for

¹Lytle Creek W. Co. v. Perdew, 2 Pac. Rep. 732, (decided February 12, 1884.)

one hundred and thirty-two hours and nineteen minutes out of each and every three hundred and seventy-two hours,') and that other appropriators had a right to the use thereof, but fails to find as to the order in which the persons interested in these appropriations used the water, or as to the times when the period during which the plaintiff was entitled to the exclusive use would recur, no decree fixing the rights of the plaintiff, or prohibiting the defendant from interfering therewith, can be rendered, unless all the other persons entitled to the use of the waters of the same stream are before the court as parties to the action." The judgment entered in favor of the defendant was therefore reversed, and the cause was remanded, with direction that the court below should order all persons owning or claiming rights to the use of any of the water of said creek to be made parties to the action.

CHAPTER VI.

RIPARIAN RIGHTS ON PRIVATE STREAMS.

I. LEGISLATION ON THE SUBJECT.

- § 94. Distinction between appropriator and riparian owner.
- 95. Application of the common law.
- 96. Summary of statutory legislation—California.
- 97. Nevada.
- 98. Montana.
- 99. Colorado.
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- 101. Dakota.
- 102. New Mexico.
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- 104. Wyoming.
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II. THE EFFECT OF THIS LEGISLATION.

- § 106. Riparian rights abolished.
- 107. Two distinct systems.

I. LEGISLATION ON THE SUBJECT.

§ 94. Distinction between appropriator and riparian owner.

The preceding discussion has been exclusively confined to the rights of appropriating and using the waters of public streams, flowing entirely through the public lands of the United States, before any private owner has acquired from the government, by patent or otherwise, the title to a tract or tracts of land upon their banks. All the decided cases heretofore cited, and all the judicial opinions, except perhaps a few *dicta* in one or two of the very earliest California cases, have distinguished between the appropriation from these public streams, and the rights to the water after the land, or any part of it, bordering on a stream, has passed into the ownership of private proprietors. In the

recent decisions, the court most carefully guards against any inference that they affect the rights of such owners, and expressly distinguishes between the rules laid down governing the taking and use of water from public streams, and those relating to "riparian proprietors" and "riparian rights," properly so called. I purpose now to examine the position of these "riparian proprietors," and to ascertain, as far as possible, what are their "riparian rights," under the law of the Pacific communities. If, before any appropriation whatever has been made of the waters of a stream hitherto wholly public, a private person acquires from the government the title to, and thus becomes the absolute owner of, a tract of land through which such stream runs, or even lying on one of its banks, although he makes no actual diversion of the water, an entirely new element is introduced into the problem. He is clearly not embraced within the operations of the doctrines heretofore explained. He is a true "riparian proprietor." His own rights over the stream are as complete and perfect as though all the other lands on its borders were held by private owners. The unrestricted right of diverting and using the water for some beneficial purpose by any prior appropriator does not exist against him. *A fortiori* is this so where many owners have acquired title to different tracts abutting on the stream, and finally where all the lands bordering on both sides of the stream through its whole length have passed into the ownership of private proprietors. There is then presented exactly the condition of circumstances which exists in England, and in the older and fully-settled states of the Union,—the condition in which the common-law doctrines concerning riparian rights arose, and to which they were originally applied.

§ 95. Application of the common law.

Assuming a stream to be so situated, with the lands on its banks owned by private proprietors, and assuming that no pro-

prietor has yet made any actual diversion of its waters, the question is fairly presented, can any one of these owners, by means of a *prior* appropriation, acquire the right, as against the others, to divert, use, and consume any quantity of the water which may be necessary for some beneficial purpose, such as irrigating, mining, etc., and thus deprive all the other proprietors bordering on the stream, above and below him, of the benefits and uses of the stream, as may be done by the prior appropriator on a public stream? Or, on the other hand, are the rights of all these proprietors equal and alike, irrespective of any appropriation or diversion actually made by any one of them, and are their rights defined, measured, and regulated by the common-law rules concerning riparian proprietors; in other words, are their rights, in a true sense, the "riparian rights" recognized and protected by the common-law doctrines? Or, finally, if neither of these inquiries can be fully and unreservedly answered in the affirmative, has any other peculiar system of rules applicable to such persons been established, combining in some measure the common-law doctrines with the special doctrines touching the appropriation of public streams? Do the common-law rules wholly control? or do the doctrines concerning public streams govern? or has any other modified system of regulations been established? or is the whole matter still left in a condition of uncertainty, to be settled by the courts or the legislature? These are the questions which must be examined, and their answer, if possible, given. In pursuing this examination, we must ascertain—*First*, whether the statutes furnish any, and if so what, answer; and, *second*, what conclusions may be derived from judicial decisions. I shall, therefore, by way of introduction, give a summary of the legislation on the subject which has been adopted by the various states and territories embraced within our discussion.

§ 96. Summary of statutory legislation — California.

The Civil Code of California, which went into effect on the first of January, 1873, contains the following provisions, which, in terms, apply to all streams, public and private. Their language being general, not restricted to any class of streams, must, of course, be construed as applying to all. It will be noticed, however, that these provisions are a mere statutory declaration or enactment of the special rules which had been previously settled by the courts concerning the appropriation of public streams, virtually as formulated in the previous sections of this essay. The title of the Code is denominated "Water-Rights," and contains the following sections, which I quote in full:

"Sec. 1410. The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation.

"Sec. 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose the right ceases.

"Sec. 1412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made.

"Sec. 1413. The water appropriated may be turned into the channel of another stream, and mingled with its water, and then reclaimed, but in reclaiming it the water already appropriated by another must not be diminished.

"Sec. 1414. As between appropriators, the one first in time is the first in right.

"Sec. 1415. A person desiring to appropriate water must post a notice in writing, in a conspicuous place, at the point of intended diversion, stating therein (1) that he claims the water

there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

"Sec. 1416. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.

"Sec. 1417. By 'completion' is meant the conducting the waters to the place of intended use.

"Sec. 1418. By a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted.

"Sec. 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith.

"Sec. 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases.

"Sec. 1421. The recorder of each county must keep a book, in which he must record the notices provided for in this title."

All these provisions by themselves would furnish a reasonably clear and certain system of rules applicable to *all* streams, whatever may be thought of their expediency or justice; but the following and final section turns the whole into utter doubt

and uncertainty, so far as it can apply to private streams, or streams bordering on the lands of private owners. This final section is as follows:

“Sec. 1422. *The rights of riparian proprietors are not affected by the provisions of this title.*”

I would remark, in passing, that so far as the title applies to streams wholly public, on the banks of which there are as yet no riparian proprietors, and, of course, no “riparian rights,” it furnishes a system of rules which must be complied with by all those who seek to make an appropriation of the water subsequently to the going into effect of the statute. Thus, for example, the contents of the notice and the place of posting are definitely described; also the time within which work must be commenced after posting the notice is fixed in all cases; and the work must be prosecuted “uninterruptedly,” the only causes of interruption allowed being “snow or rain.” The early decisions prescribed no such definite rule, but left the time of commencing the work, and of prosecuting it to completion, to depend upon many other special circumstances of each case, such as the situation and physical conformation of the country, the difficulty of transportation, of obtaining materials and labor, and the like. So far, therefore, as the title applies solely to the appropriation of water from streams wholly public, it furnishes rules which must be obeyed, somewhat more definite and less elastic than those laid down by the courts; and as to its meaning, force, and effect, in connection with such streams, there seems to be no uncertainty nor difficulty.

In addition to these provisions of the Civil Code, there is a statute called “An act to promote irrigation,”¹ passed in 1872. This statute provides that, if “owners of any body of lands susceptible of one mode of irrigation” desire to irrigate the same, they may take steps in connection with the board of supervisors

¹St. 1871-72, pp. 945-948.

by which they become an association for irrigating purposes. They may make by-laws for the appointment of trustees, who have general management of their affairs, and for the construction and maintaining of irrigating works. The powers and duties of these trustees are defined. Provisions are made for assessments upon the members of the association, for the purpose of defraying the cost of constructing and maintaining the works.

"Sec. 21. The trustees may acquire, by purchase, all property necessary to carry out and maintain the system of irrigation provided for.

"Sec. 22. The trustees may acquire by condemnation (1) the right to the use of any running water not already used for culinary or domestic purposes, or for irrigating, milling, or mining purposes; (2) the right of way for canals, drains, embankments, and other works necessary," etc.

"Sec. 23. The provisions of title 7, part 3, of the Code of Civil Procedure, (concerning the condemnation of private property for public uses,) are applicable to and the condemnation herein provided for must be made thereunder."

It is further provided that parties owning the whole district to be irrigated may proceed as above described, without appointing any trustees; that is, may manage the whole by themselves. This act is declared not to extend to the counties of Fresno, Kern, Tulare, and Yolo.

It is very plain that this statute does not contemplate nor recognize any right of land-owners to appropriate the waters of private streams; that is, of streams running through or adjacent to lands of private owners. The "riparian rights" of such owners are most certainly assured and protected; for the owners desiring to appropriate the water of such a stream must proceed to condemn it under the right of eminent domain, and must of course pay compensation; and the only parties who could be compensated are the owners of lands on the banks of the stream,

whose "riparian rights" to use its waters would be invaded. Such riparian rights, like all other rights of private property, are held subject to the state's power of eminent domain.

§ 97. Nevada.

The only legislation of this state bearing on the subject, which I have found, is contained in certain sections of the compiled laws which permit the construction of flumes or ditches for carrying water. Parties may construct a ditch or flume across private land, and to that end may take such land by right of eminent domain, on paying just compensation to the owner thereof; the amount of the compensation to be determined in a manner and by a proceeding described. This act shall not interfere with any prior or existing claim or right.¹ The statute makes no allusion to the appropriation of or acquisition of title to the water to be conducted by such ditches or flumes.

§ 98. Montana.

The legislation of this territory is in complete derogation of the common-law "riparian rights." It will be noticed that the lands for which it provides the use of water may be situated anywhere within the territory. Their situation on, near, or at a distance from streams is wholly immaterial. I give an abstract of the provisions, only quoting the exact language of the most important and fundamental provisions.²

Sec. 731. Any person or corporation owning or having a possessory title to any agricultural land "shall be entitled to the use and enjoyment of the waters of the streams and creeks in said territory, for the purposes of irrigation and making said land available for agricultural purposes, to the full extent of the soil thereof." Proviso, when by a prior appropriation any per-

¹ Comp. Laws Nev. 1873, §§ 3852-3855.

² Rev. St. Mont. 1879, p. 562, §§ 731-741.

son has diverted all the water of a stream, or so much thereof that there is not an amount left sufficient for those having a subsequent right thereto for irrigation, then any surplus left by said prior appropriator shall be turned back into the stream for the use of subsequent claimants, with a penalty in the form of damages for a neglect to do so after demand made.

Sec. 732. Any such person or corporation owning land, when there is no available water thereon, or when it is necessary to raise the water of "said stream," so as to irrigate said land, or when said lands are too far removed from said streams to use them, said persons, etc., shall have a right of way *across any tract of land* for ditches, canals, flumes, etc.

Sec. 733. Such right only extends to the digging ditches, etc., across the land of another, as may be necessary.

Sec. 734. All controversies between different claimants of water shall be determined by the dates of their respective appropriations.

Sec. 735. All waters of streams are so available to the full capacity thereof for irrigating, "without regard to deterioration in quality or diminution in quantity," so as not to affect the rights of a prior appropriator; but in no case can water be diverted from the ditches, etc., of such appropriator.

Sec. 736. Any person digging a ditch, etc., under section 732, and thereby injuring the lands of another, shall be liable in damages to the injured party.

Sec. 737. This act shall not impair rights already acquired.

Sec. 738. Nor shall this act prevent the appropriation of said streams for mining, manufacturing, and other beneficial purposes, and the right to appropriate for such purposes is hereby declared and enforced.

Sec. 739. Persons constructing ditches across public highways must repair the same.

Sec. 740. Penalty for violation of last section.

Sec. 741. All controversies respecting rights to water for any purposes, and the rights of parties to use water, shall be determined by the dates of their respective appropriations, "with the modifications heretofore existing under the local laws, rules, or customs, and decisions of the supreme court of said territory."

The same statutes, in the chapter concerning corporations, authorize the formation of corporations for the purpose of taking and conducting water from streams for various beneficial purposes.¹ The most recent volume of Session Laws also contains the following provisions: An act of congress² declaring that all non-navigable streams on the public land in the territory shall be free and open for appropriation for irrigation, mining, and other purposes, subject to existing rights; also an act of the territorial legislature providing a penalty for diverting water by one not entitled, to the injury of another.³

§ 99. Colorado.

The statutes of this state, in their latest revision, also contain an elaborate system of rules concerning the use of water for irrigation, which resembles in its essential features that of Montana. It will be sufficient for my purposes to give a brief abstract of its provisions, quoting the exact language only of those which are fundamental.⁴

Sec. 1711. "All persons who claim, own, or hold a possessory right or title to any land or parcel of land within the boundaries of the state of Colorado, where these claims are on the bank, margin, or neighborhood of any stream of water, creek, or river, shall be entitled to the use of the water of said stream, creek, or river, for the purposes of irrigation, and making said

¹ Rev. St. Mont. 1879, pp. 456, 457, §§ 271-275.

² Id. p. 113, §§ 1, 2.

³ Gen. St. Colo. 1883, pp. 560-587, §§ 1711-1812.

⁴ Sess. Laws Mont. 1883, p. 27; Act 44th Cong. 2d Sess. c. 107.

claims available, to the full extent of the soil, for agricultural purposes."

Sec. 1712. When any such person, as mentioned in the last section, "has not sufficient length of area exposed to said stream to obtain a sufficient fall of water to irrigate his land, or that his farm, etc., is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for purposes hereinbefore mentioned."

Sec. 1713. The right of way given by the last section only extends to the construction of a ditch or canal sufficient for the purpose of carrying the water required.

Sec. 1714. If the amount of water is not sufficient to furnish a constant supply to all the community using a ditch or canal, provision is made for allotting it to different consumers on alternate days or times.

Sec. 1715. If the owners of tracts of land refuse to allow ditch-owners a right of way, the right may be obtained by condemnation, under the power of eminent domain.¹

Secs. 1716-1720. Special provisions regulating the use, maintenance, repair, etc., of ditches.

Sec. 1721. The ditches herein provided for are for irrigation only.

¹[In Colorado, when a person, without initiating any steps under pre-emption or other laws to procure title to public lands, places improvements thereon, and another desires to construct his irrigating ditch over or across such lands, if, by a proper proceeding, full compensation is determined and is paid for all damage or injury to the improvements caused

by constructing such ditch, the constitutional and statutory requirements are complied with. *Knoth v. Barclay*, 8 Colo. 300, s. c. 6 Pac. Rep. 924. The Colorado constitution, art. 16, § 6, provides that "the right to divert unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better

Sec. 1722. In case of a deficiency in the supply of water, provision is made for regulating its *pro rata* distribution among the consumers entitled. Additional sections provide for the formation and management of public irrigation districts; for the defraying the expenses of constructing, maintaining, repairing, etc., the ditches therein; for the regulation of the water supply and distribution; for the rates of charge, etc.

Secs. 1762-1801. An elaborate system is provided for the adjudication of rights of priority among different appropriators, partly by means of special proceedings, and partly by means of ordinary actions.¹

Another portion of these statutes authorizes the formation of corporations to take and convey the water of streams for mines, mills, irrigation, etc.²

Sec. 309. Such corporations "shall have the right of way over the line named in their certificates, [of incorporation,] and shall also have the right to run the water of the stream or streams named in the certificate through their ditches." Proviso, that water shall not be diverted from any stream to the detriment of any person or persons who may have priority of right.³

right as between those using the water for the same purpose." Under this clause it is held that, while the legislature cannot prohibit the appropriation or diversion of water, for useful purposes, from natural streams upon the public domain, it has the power to regulate the manner of such appropriation or diversion. *Larimer Co. Reservoir Co. v. People*, 8 Colo. 614, s. c. 9 Pac. Rep. 794.]

¹ Gen. St. Colo. 1883, p. 571.

² Id. pp. 198-201, §§ 305-315.

³ [In the case of *Golden Canal Co. v. Bright*, 8 Colo. 144, s. c. 6

Pac. Rep. 142, the court had under consideration Gen. St. Colo. § 1738 *et seq.*, ("An act to regulate the use of water for irrigation, and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation and use,") with special reference to the relative rights of ditch-owners, and the purchasers of water from them. And it was held (1) that the phrase "regulate the use," found in the title of the statute, is not confined to the forbidding of injustice in

§ 100. Idaho.

The General Laws of this territory contain "An act to regulate the right to the use of water for mining, agricultural, and manufacturing and other purposes."¹ A portion of this statute is the same in substance, with some variations in the detail, as the provisions hereinbefore quoted from the Civil Code of California, while the remainder follows the system prevailing in Colorado and Montana.

Section 1. The right of the use of the water flowing in any river, creek, canyon, ravine, or other stream, may be acquired by appropriation, and, as between appropriators, priority in time shall, subject to the provisions of this act, secure a priority of right.

Sec. 2. The appropriation must be for some beneficial purpose, etc.

Sec. 3. Appropriator may change the place of diversion, etc., if no injury is done to others.

Sec. 4. Notice to be given substantially as in California.

the distribution, the prevention of waste, or the apportionment in times of scarcity. It is broad enough to include the frustration of unfair exactions, and the fixing of reasonable rates. (2) Under the law, though the prior purchaser has not made his application within the time prescribed by rule, yet if he do so afterwards, and while the ditch-owner is free from conflicting obligations, and is able to grant his request, the statutory right is not forfeited. (3) The presumption is that the legislature intended to confer the privileges specified in the act, (section 1740,) unlimited by any qualification as to the applicant's ability to procure water from any other source. (4)

The right of an applicant for water to the writ of *mandamus*, to compel the defendant to supply it under the regulations provided by statute, is not prejudiced by the fact that he has prospectively a remedy by an action for damages in case his crops fail as the result of lack of irrigation. (5) The owner of an irrigation ditch, under the statute, is bound, provided he has water sufficient for the purpose, to admit a prior purchaser to its use and enjoyment, upon his payment or tender of the proper price therefor, provided the right thereto has not been forfeited.]

¹ Gen. Laws Idaho 1881, pp. 267-273, §§ 1-19.

Sec. 5. Work must be commenced within sixty days, etc., and prosecuted to "complete diversion," etc.

Sec. 6. "Complete diversion" defined same as "completion" in the California Code.

Sec. 7. When work is completed, the right relates back to the time of giving notice.

Secs. 8, 9. Ditches, appropriations, and claims heretofore made are protected.

These provisions plainly do not differ in any material manner from those of the California Civil Code. The following sections contain the essential elements of the Colorado and Montana legislation:

Sec. 10. "All persons, companies, and corporations, owning or claiming any lands situated on the banks or in the vicinity of any stream, shall be entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed."

Sec. 11. When any such person, etc., has not sufficient frontage on a stream to afford a sufficient fall for such a ditch, or when his land is back from a stream and convenient facilities for irrigation cannot otherwise be had, he "shall be entitled to a right of way through lands of others for the purposes of irrigation." Proviso, that he shall keep his ditch in good repair, and shall be liable to the owner of the land which it crosses for injuries caused by overflow or neglect or accident.

Sec. 12. If the owner of the land refuses a right of way, the same may be obtained by condemnation, upon payment of the compensation as fixed.

Sec. 13. Provisions for ascertaining and fixing such compensation by appraisers.

Sec. 14. Persons, etc., having land adjacent to any stream may place in its channel or on its banks dams, etc., to raise the water above the level of the banks; and a right of way for con-

ducting such waters across the lands of others may be acquired in the manner prescribed in the last two sections.

Secs. 15, 16. Provisions as to maintaining and keeping in repair the ditches; not to do damage, etc.

Sec. 17. All rights acquired previous to this act are not affected thereby.

Sec. 18. When the water is not enough to fully supply a whole community or neighborhood, it must be distributed among them according to the local customs as established and as recognized by the courts.

Sec. 19. If a ditch is constructed in order to sell the water for irrigation, persons shall be entitled to said water at the usual rates, in the following order, viz.: *First*, all persons through whose land the ditch runs, in the order of their location along the line of the ditch; *second*, after the last named, then those on either side of the ditch,—those at the same distance each side being equally entitled, etc. Excessive use by any one is prohibited.

Another statute is entitled "An act for the regulation of irrigation."¹ This statute provides for the creation of water or irrigation districts, and for the election of a "water-master" in each; and minutely prescribes his duties of superintending the ditches, their repair, the distribution of water among consumers, etc.

§ 101. Dakota.

A recent statute of this territory adopts the fundamental notion of the Colorado, Montana, and Idaho legislation; but extends the right of appropriation equally to all beneficial purposes, as well as that of irrigation.²

Section 1. Any person or corporation, having title or possessory right to any mineral or agricultural land, shall be entitled

¹ Gen. Laws Idaho, pp. 273-275,
§§ 1-6.

² Sess. Laws Dak. 1881, pp. 266-274.

to the use and enjoyment of the water of any stream, creek, or river within the territory, for mining, milling, agricultural, or domestic purposes; but this shall not interfere with rights previously acquired.

Sec. 2. Such persons may have a right of way across the lands of others under the same circumstances as prescribed in the Colorado, Montana, and Idaho statutes.

Sec. 3. This right of way shall only extend to the construction of a suitable ditch, or canal, etc.

Sec. 4. All controversies between different claimants of water shall be determined by the dates of their respective appropriations.

Sec. 5. "The water of the streams, rivers, and creeks of this territory may be made available to the full extent of the capacity thereof, for mining, milling, agricultural, or domestic purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of prior appropriators."

Sec. 6. If the owner of lands sustains injury by a ditch constructed across it, under section 2, the ditch-owner shall be liable to him in damages therefor.

Sec. 7. Relates to the abandonment of ditches or appropriations.

Sec. 8. Prescribes penalties for violation of foregoing provisions.

One remarkable feature of this statute is that, unlike those of Colorado and Idaho, it makes no provision whatever for obtaining a right of way for a ditch across the lands of another owner, by condemnation. It seems to permit an appropriator to construct his ditch across the lands of another, without the latter's consent, without any compensation ascertained and paid, and without the necessity of any proceedings for a condemnation. The only provision for the benefit of such land-owner

seems to be a right to recover damages, if *any injury* is caused by the ditch. Such legislation is, to say the least, remarkable. It seems to be a plain invasion of the rights of private property, an evident violation of the constitutional prohibition against depriving a person of his property without due process of law, and taking private property for public use without just compensation. That such a provision is invalid seems hardly to admit of a doubt.

§ 102. New Mexico.

In this territory the use of water for the purposes of irrigation is made paramount to all other uses, for milling, manufacturing, and the like. The general laws contain an elaborate system of legislation for the construction and maintenance of public and private "*acequias*" or irrigating canals. This system is embodied in the statutes of several successive legislatures, and is evidently borrowed from the Mexican law.¹

Section 1. "All inhabitants of the territory of New Mexico shall have the right to construct either private or common [*i. e.*, public] *acequias*, and to take the water for said *acequias* from wherever they can, with the distinct understanding to pay the owner through whose land said *acequias* pass a just compensation taxed for the land used." Provision is made for appraising and fixing the amount of such compensation, in cases of dispute, by appraisers to be appointed by a probate judge. [It may be remarked that these early statutes were originally enacted and published in the Spanish language. The translation found in the last edition of the General Laws, from which these sections are quoted, is extremely literal, and sometimes fails to adopt the precision and certainty of expression usual in our English and American statutes.]

¹Gen. Laws N. M. 1880, pp. 13-23, embracing Acts 1851, 1852, 1861, 1863, 1866, and 1880, concerning "*acequias*," or irrigating canals.

Sec. 2. "No inhabitant of said territory shall have the right to construct any property to the impediment of the irrigation of land or fields, such as mills or other property that may obstruct the course [*i. e.*, flow] of the water; as the irrigation of the fields should be preferred to all others, [*i. e.*, to all other uses.]"

Sec. 4. All owners of tillable lands shall labor on public *acequias*, whether they cultivate the land or not.

Sec. 9. "All rivers and streams of water in the territory formerly known as public *acequias* or ditches are hereby established and declared to be public *acequias* or ditches."

The foregoing quotations sufficiently indicate the essential nature of this system, without going into any further detail. Subsequent portions of the statute make provision for the election of "overseers" in different precincts, and define their duties in managing the *acequias*, and in distributing the water supply. Ample provision is made for maintaining the ditches, and for keeping them in repair by public labor, etc.

§ 103. Arizona.

The legislation of this territory somewhat resembles that of New Mexico, except that the use of water for mining purposes seems to have a preference over that for all other purposes, even for irrigation.

The fundamental principle that the water of streams, etc., is public, incapable of private and exclusive ownership, is declared in the territorial bill of rights.¹

"Art. 32. All streams, lakes, and ponds of water, capable of being used for purposes of navigation or irrigation, are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their

¹Comp. Laws Ariz. 1877, p. 27, Bill of Rights.

own private use, except under equitable regulations and restrictions as the legislature shall provide."

The use of water is regulated by the provisions of a chapter concerning *acequias* or irrigating canals.¹

Sec. 3240. All rivers, creeks, and streams of water are declared to be public, and applicable for purposes of irrigation and mining.

Sec. 3241. All *acequias* at present established shall be continued.

Sec. 3242. All inhabitants of this territory who own or possess arable or irrigable land shall have the right to construct public or private *acequias*, and to obtain the necessary water for the same from any convenient river, creek, or stream.

Sec. 3243. Such *acequias* may be run through the land of another when necessary, the damages by way of compensation to be fixed by assessors appointed by a judge, etc.

Sec. 3244. No interference shall be permitted with these *acequias* by dams and other structures, except when used for mining purposes as otherwise provided.

The use of water for mining purposes seems to have preference over all other uses, even when the latter have been actually established; but parties using water for mining purposes must pay compensation in damages for injury thereby caused to irrigating canals (*acequias*) already existing. There is no such detailed system of regulations for the *acequias* as exists in New Mexico.

§ 104. Wyoming.

The legislation of this territory is the same in substance, and almost identical in language, with that of Colorado, heretofore described.²

¹ Comp. Laws Ariz. 1877, p. 538.

² Comp. Laws Wyo. 1876, pp. 377-379, §§ 1-12.

Section 1. Any person or corporation having the title or the possessory right to any tract of land within the territory is entitled to the use of the water of any stream, etc., for purpose of irrigation, and of making the land available for agriculture, etc.

Secs. 2-9. To that end, such person, etc., may have right of way across the lands of another for a ditch. Such right of way may be acquired by condemnation, the compensation therefor being fixed by appraisers. When the supply of water is not sufficient to furnish a full amount to an entire community, it is to be apportioned among them. Owners or occupants bordering on streams may place dams in the channel or on the banks in order to raise the water, and may have a right of way to conduct such water. Prior vested rights to the use of water are protected. Provision for keeping ditches, etc., in good repair, etc.

§ 105. Utah.

The General Statutes and Session Laws of this territory contain an elaborate and detailed system of regulations devoting the water of all streams to the purpose of irrigation. The common-law doctrines concerning property in the waters of streams, and "riparian rights," are completely abrogated. The leading statute concerning irrigation¹ provides for the formation of irrigation districts. The citizens of such districts may be organized into irrigation companies, and may elect trustees for the management of these companies. A tax may be levied upon the lands in each district benefited in order to defray expenses. Land may be condemned for ditches, etc. All ditches and other

¹ Comp. Laws Utah 1876, pp. 219-225, "An act to incorporate irrigation companies," passed January 20, 1865; amended in Sess. Laws 1878, pp. 49-53. [Where parties, with the knowledge and consent of the original constructors of an irrigation ditch, work upon and as-

sist in widening and repairing the same, with the tacit understanding that they are to be entitled to use the same, they thereby acquire right and title to such ditch, and to the water therefrom. *Lehi Irrigation Co. v. Moyle*, (Utah,) 9 Pac. Rep. 867.]

works become the property of the company, etc. No irrigation company shall be entitled to divert the waters of any stream to the injury of any irrigation company or person holding a prior right to the use of said water.¹

A more recent statute regulates the use of water by private persons, and protects their rights to such use, supplementary to the former system.² The selectmen of each county are made "water commissioners," and have general power to manage irrigation, and to regulate the use and distribution of water among the land-owners of their respective counties. This statute contains provisions, not found in any other legislation, which divide the vested rights of private persons to use water for domestic, agricultural, manufacturing, and all other beneficial purposes, into two grades, "primary" and "secondary," of which the "secondary" is the subordinate grade.³ The "primary" vested rights exist (1) when any person or persons shall have taken, diverted, and used any of the unappropriated water of any natural stream, lake, or spring, or other natural source of supply; (2) when any person or persons shall have had open, peaceable, uninterrupted, and continuous use of water for a period of seven years. The "secondary" rights exist, subject to the "primary," (1) when the whole water of any stream, lake, or spring, or other natural source of supply, has been taken, diverted, and used by prior appropriators for a part or parts of each year, and other persons have subsequently appropriated said water during other parts of said year; and (2) when the unusual increase of the water of a stream, over and above its average amount for seven years, has been appropriated and used by any person or persons, and the ordinary or average flow of the same stream has been appropriated and used by other persons.

¹ Sess. Laws 1878, p. 53, § 7.

² Sess. Laws 1880, pp. 36-41, "An act for the recording vested rights

to the use of water, and regulating their exercise."

³ Id. §§ 6, 7.

In Oregon and Washington territory there is not, so far as I have been able to discover, any legislation whatever concerning the use of water, or property in natural streams and lakes, or the rights of riparian proprietors. The necessity for any such special legislation, it may be assumed, does not exist in these commonwealths.

II. THE EFFECT OF THIS LEGISLATION.

§ 106. Riparian rights abolished.

It is plain from the foregoing summary that in the state of Colorado, and in the territories of Montana, Idaho, Dakota, Wyoming, New Mexico, Arizona, and Utah, the legislation has wholly abandoned and abrogated all the common-law doctrines concerning private property in streams and lakes, and concerning the "riparian rights" of "riparian proprietors." The statutes in express terms apply to all streams, as well those running through public lands as those bordered by the lands of private owners. No exception from their operation is made in favor of persons owning land on the banks of a stream. Under these statutes no proprietor derives any legal benefit or advantage from the fact that his land is immediately adjacent to a stream. Unless he has made an actual appropriation and diversion of its water for the use of his own land, he is liable to have perhaps the entire stream appropriated and diverted away for the benefit of a proprietor whose land is situated at any distance from the stream. In fact, a proprietor immediately adjoining a stream is, by reason of his position, subject to a liability which must often be a grievous burden upon the land, and a serious interference with his rights of private property; namely, the liability to which his land is exposed of having ditches or canals constructed across it without his consent, for the purpose of conducting water from the stream to more distant lands. Even though this right of

aqueduct across the land of a private owner must be acquired by condemnation, under the exercise of the power of eminent domain, and upon payment of compensation, still it must be a most material incumbrance upon all riparian owners, and hinderance to their enjoyment and free use of their own property. The statutes of one territory seem to go to the extreme of permitting canals and ditches to be constructed across the lands of private owners, against their consent, without any condemnation or any compensation. Such a statutory provision seems to be a most palpable and express invasion of private property rights, and it is difficult to understand upon what principle its validity can be upheld. And yet the early decisions in Colorado *seem* to hold that all lands of private owners are subject to the rights of others to locate and construct irrigating canals and ditches over them, and that the statute on this subject is simply declaratory of the common law in that commonwealth.¹

§ 107. Two distinct systems.

It will be seen that the legislation, as a whole, in these last-mentioned commonwealths, provides in fact for two distinct systems. One of these is wholly private; permits private owners to appropriate the water of any stream, and to conduct it by a ditch or canal to his own lands. All disputes between two or more appropriators or claimants, under this system, must generally be settled by judicial proceedings, or appropriate actions, in which the priority of the appropriation must determine all questions of priority in right. The other system is public, or at least *quasi* public. It provides for territorial water or irrigation districts, including a community, or space of territory which can be conveniently irrigated by the same supply, drawn from the same source. These districts are under the general control

¹See *Yunker v. Nichols*, 1 Colo. 100; *Crisman v. Heiderer*, 5 Colo. 551; *Schilling v. Rominger*, 4 Colo. 589.

of county governments; have local or district officials, whose powers relate to the location, construction, and maintenance of a system of canals for each district, to the raising of money to defray the expense of their construction and maintenance, to the distribution of water among the landed proprietors in the districts, and other like matters. I shall not, at present, discuss the policy of this legislation. Nor shall I make any attempt to suggest and examine the questions which must arise from the particular provisions of these statutes. Hitherto very few cases have come before the courts involving a judicial interpretation of these legislative systems, and it would be useless to speculate concerning any possible interpretation in the future. It is enough to say that in each of these commonwealths the statutes have covered the whole ground, entirely displacing the common-law doctrines; and the labors of their courts will be confined to the proper construction and application of the statutory rules. Without attempting any further examination of these statutes, which so completely displace the common-law doctrine, I shall confine myself to the law concerning riparian rights, riparian proprietors, and the use of streams flowing through private lands, in the commonwealths which have not adopted these complete statutory systems, and settled all questions of right by legislation. These commonwealths are the states of California and Nevada.

CHAPTER VII.

RIPARIAN RIGHTS IN THE PRIVATE STREAMS OF CALIFORNIA AND NEVADA.

I. NATURE AND EXTENT OF THESE RIGHTS.

- § 108. Ambiguity of California statutes on water-rights.
- 109. Review of the authorities.
- 110. Common-law doctrine of riparian rights obtains in California.
- 111. Construction of section 1422.
- 112. Riparian rights excepted.
- 113. Interpretation of section 1422—*Lux v. Haggin*.
- 114. Mexican law—Effect on riparian rights.
- 115. Riparian rights in Kern district.
- 116. Common law of England.
- 117. Who are riparian owners.
- 118. Prescriptive water-rights.

II. USES TO WHICH THE WATER MAY BE PUT.

- § 119. General statement of riparian rights—*Van Sickle v. Haines*.
- 120. Modifications on doctrine of *Van Sickle v. Haines*.
- 121. Legitimate riparian uses.
- 122. California decisions.
- 123. Natural uses.
- 124. Secondary uses.
- 125. Reasonable riparian use.
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I. NATURE AND EXTENT OF THESE RIGHTS.

§ 108. Ambiguity of California statutes on water-rights.

What is the present condition of the law of California concerning the rights of private owners on the banks of natural streams to use the water of such streams? We have already seen that the Civil Code furnishes what purports to be a system

of rules determining and regulating the rights of water in all streams, public and private; but that the effect and operation of these rules are rendered at least doubtful, and perhaps nugatory, in their application to streams running through or by private lands, by the final provision, section 1422: "The rights of riparian proprietors are not affected by the provisions of this title." What are the practical consequences, with respect to the whole legislation of the Code, of this restrictive clause? It has been said, by way of answer, that this clause is *not* restrictive, and that it can produce no practical consequence upon the legislation as a whole, because (1) under the law of California, independently of the Code, private "riparian proprietors" have no rights as such to the waters of the adjoining streams; or (2) the "rights of riparian proprietors" intended to be saved and protected are simply those which are not inconsistent with the preceding provisions of the title, and which are not, therefore, taken away by it; those rights, in short, which still remain after and notwithstanding the previous and operative sections of the statutes. Before entering upon any discussion of this most important question, it will be expedient to collect the various judicial authorities bearing upon it, which will aid in its examination.

There seems to be a prevalent opinion that the common-law doctrines concerning "riparian rights" of "riparian proprietors" upon natural streams have no existence whatever in the law of California; that the rights of all private owners of lands bordering upon any stream are wholly subordinate and subject to the right of one who has made a prior appropriation and diversion of its water to any extent for some beneficial purpose; that priority of appropriation and diversion determines the existence, nature, and extent of the rights to the waters of all natural streams among all persons. This opinion is wholly unsupported by judicial authority. It is directly opposed to a long line of decisions and of *dicta* which have, in the clearest manner, both

prior to and since the Codes, recognized the common-law doctrines concerning "riparian rights," and protected "riparian proprietors" in the enjoyment of those rights, to some extent at least, although they have not fully defined those rights, in all their scope and detail. The correctness of this statement will clearly appear from the following citations.

§ 109. Review of the authorities.

In the very latest case, which related wholly to the appropriation of the waters of a public stream, the court says: "No question as to the use of the waters of a stream by *riparian proprietors* is presented by this record. There is nothing in the pleadings or findings to indicate that when all the waters of Lytle creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership."¹ The court here expressly recognizes the distinction between the right of appropriating a stream flowing through the public lands, and the right to the use of its waters after any of the lands by or through which it flows have been acquired by private owners. In the recent case of *Ellis v. Tone*² the private proprietor of lands bordering on a stream maintained an action and recovered damages for a diversion of the water from the stream, made by the defendant in 1877. The decision recognizes and is based upon the existence of some riparian rights held by the plaintiff as a riparian proprietor on the stream. The opinion, it is true, does not discuss the general doctrine, but is confined to an examination of certain instructions given to the jury at the trial, and the entire charge of the trial judge is not reported. The case, however, is a direct authority for the existence of "riparian rights" under the common-law doctrines, at least to some extent. The decision in *Pope v. Kinman*³ is unambigu-

¹ *Lytle Creek W. Co. v. Perdew*,
(Cal.) 2 Pac. Rep. 732.

² 58 Cal. 289.

³ 54 Cal. 3.

ous and express. A stream called "Lytle Creek" rises on public lands, and then flows through private lands, including those of the plaintiff and of the defendants. The plaintiff received the patent to his tract in 1872. The title, or at least the possession, of the defendants was earlier. The defendants had diverted and used all the water of the creek, and claimed the exclusive right to do so. The plaintiff brought this action in 1877 to quiet his title to the use of the water as a riparian owner, and to restrain the defendants' diversion. The court, after holding that the plaintiff's action was not barred by the statute of limitations, says: "The principal question is whether it is competent for the defendants, by the mere diversion of the waters of Lytle creek, which is an innavigable stream flowing across the lands of the plaintiff, to deprive the plaintiff of all interest or right of any nature in the waters of that creek. *As being owner of the land, the plaintiff has an interest in the living stream of water flowing over the land; his interest is that called the 'riparian right.'*" It is not necessary in this case to define in detail the precise extent of the riparian rights as existing in this country; it is enough to say that under settled principles, both of the civil and the common law, the *riparian proprietor has a usufruct in the stream* as it passes over his land. The judgment of the court below deprived the plaintiff of that usufruct, and declares in terms 'that plaintiff has no right, title, nor interest in said waters or any portion of them.' The judgment of the court below is therefore modified so as to read as follows: (1) That defendants have nothing as against the plaintiff, except only such rights as any of them may have of like character with that of the plaintiff, as being riparian proprietors of land bordering on said stream; and (2) that none of defendants have any right, title, or interest in or to the waters of said creek except as riparian proprietors as aforesaid."

The rights of a "riparian proprietor" were also admitted and

protected in the case of *Creighton v. Evans*.¹ The court said: "It is admitted that the waters of Elk bayou flowed in its natural channel through plaintiff's land, and that defendant diverted a portion of the water to his own land for purpose of irrigation, and other purposes. It is not averred that he is a riparian owner, and as such entitled to use any portion of said water. The court properly instructed the jury that plaintiff was entitled to recover at least nominal damages, even though he had suffered no actual damages. But the court further instructed the jury that if defendant diverted a portion of the water for a useful purpose, and that enough water was left in the stream for the use of the plaintiff for watering his stock and for domestic purposes, and if the plaintiff was not damaged by the diversion, the verdict should be for the defendant. This was not only contradictory to the first instruction, but was erroneous as matter of law. So far as appears on the record, defendant was not entitled to divert the water for any purpose, and plaintiff was entitled to at least nominal damages." This case was decided in 1878, but the report does not show when the cause of action arose. Several cases concerning the interference with or use of subterranean water, whether percolating through the soil or flowing in defined streams, also recognize and are decided in accordance with the settled common-law rules on that subject.²

In the case of *Ferrea v. Knipe*³ the rights of riparian proprietors were not only recognized, but their extent was also partially defined. The controversy was between two owners upon the same stream. The defendant, for the alleged purpose of securing the water for the use of watering his stock, and for domestic purposes, had erected a dam, which collected the whole water

¹53 Cal. 55.

²See *Hale v. McLea*, 53 Cal. 578; *Huston v. Leach*, Id. 262; *Hanson*

v. McCue, 42 Cal. 303; *Mosier v*

Caldwell, 7 Nev. 363; *Strait v. Brown*, 16 Nev. 317.

³28 Cal. 341.

of the stream in a pond, and prevented any of it from flowing down to the plaintiff's lands below. An action for damages and preventive relief was sustained. Currey, J., delivering the opinion of the court, said, (page 344:) "Every proprietor of the land through or adjoining which a water-course passes has a right to a reasonable use of the water, but he has no right to so appropriate it as to unnecessarily diminish the quantity of its natural flow. The use of the water of a stream for domestic purposes and for watering cattle necessarily diminishes the volume of the stream. This is unavoidable, and though, by reason of such diminution, a proprietor on the stream below fails to receive a supply commensurate with his wants, he is without remedy, because his right subsists subject to the rightful use of the water by his neighbor on the stream above him. But while admitting that a riparian owner, to whom the water first comes in its flow has the right to use it for domestic purposes, and for watering his cattle, it is proper to observe that he has not the right to so obstruct the stream as to prevent the running of water substantially as in a state of nature it was accustomed to run. * * *" Page 345: "Though the defendant had the right to use the stream for watering his cattle, and for household purposes, he had not the right, under the circumstances, to dam up the creek, and spread out the water over a large surface, by which it would become lost by absorption and evaporation to an extent to prevent the stream from flowing to the plaintiff's premises, as it would have done had it not been for the defendant's dams. This was not a proper and beneficial use of the stream."

In the case of *Hill v. Smith*,¹ Mr. C. J. Sanderson announced the principle which underlies the common-law doctrines as still forming a part of the California jurisprudence, (page 482.) Speaking of certain erroneous views, he says: "This is due in

¹27 Cal. 475.

a great measure, doubtless, to the notion, which has become quite prevalent, that the rules of the common law touching water-rights have been materially modified in this state, upon the theory that they were inapplicable to the conditions found to exist here, and therefore inadequate to a just and fair determination of controversies touching such rights. *This notion is without any substantial foundation.* The reasons which constitute the ground-work of the common law upon this subject remain undisturbed. The maxim, '*sic utere tuo ut alienum non lædas,*' upon which they are grounded, has lost none of its force. When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel,—*ubi currere solebat*,—without diminution or alteration, it does so because its flow imparts fertility to his land, and because the water in its pure state is indispensable for domestic uses. But this rule is not applicable to miners and ditch-owners, simply because the conditions upon which it is founded do not exist in their case." The court went on further to hold that the common-law doctrines still regulated the right to the use of water in mining regions as far as the conditions of the situation and business would allow.

In the early and leading case of *Crandall v. Woods*,¹ which did not relate to the use of water for mining or other special uses, nor to the prior appropriation of water flowing in a public stream, discussed in the former portion of this article, the same general common-law doctrine was affirmed. The controversy arose between two proprietors who held different tracts of the public land upon the same stream, by a possessory right good against all third persons, but who had not yet obtained the legal title from the United States by patent or otherwise. The question was whether one of these parties could divert the water of the stream, and prevent it from flowing by or through the land

¹8 Cal. 136.

of the other, who had acquired his possessory right before any such diversion was made. This question was answered in the negative, although the possession of the one making the diversion was prior to that of the other party who complained of the diversion. Holding that possession of public land carries with it the privileges and incidents of ownership against every one but the government, the court further held, as a necessary consequence, that such possession gives the right to the use of water flowing through the land for its natural wants, but does not confer the right to divert it, and to prevent its running upon the land of another who has taken up the same subsequently, but before the attempt to change the course of the water. The opinion of the court, by Mr. C. J. Murray, uses the following language, (page 141:)

"The property in the water, by reason of riparian ownership, is in the nature of a usufruct, and consists, in general, not so much in the fluid as in the advantage of its impetus. This, however, must depend upon the natural as well as the artificial wants of each particular country. The rule is well settled that water flows in its natural channels, and should be permitted thus to flow, *so that all through whose land it passes may enjoy the privilege of using*. A riparian proprietor, while he has the undoubted right to use the water flowing over his land, must so use it as to do the least possible harm to other riparian proprietors. The uses to which water may be appropriated are, first, to supply *natural* wants, such as to quench thirst, to water cattle, for household and culinary purposes, and, in some countries, for the purpose of irrigation. [In no country where the common-law doctrines alone govern, is the purpose of irrigation placed upon the same footing with those other purposes and uses mentioned by Mr. Justice Murray.] These must be first supplied, before the water can be applied to the satisfaction of artificial wants, such as mills, manufactories, and the like, which

are not indispensable to man's existence. [The necessary limitations to be placed upon this *dictum* will be described in the sequel.] Water is regarded as an incident to the soil, the use of which passes with the ownership thereof. As a general rule, a property in water *cannot be acquired by appropriation, but only by grant or prescription.*" This decision and the opinion quoted refer to a condition of circumstances completely analogous with private *ownership* of lands on the banks of a stream. The appropriation of water from public streams for mining and other purposes, in pursuance of local customs and rules sanctioned by the act of congress, and the special condition of the mining regions, are not involved nor affected by the reasoning or the decision. The common-law doctrine here applied to private riparian proprietors who have only *possessory* titles or occupation rights to land bordering on streams, must *a fortiori* extend to those riparian proprietors who have obtained complete legal titles and ownership over such lands. The same doctrine was affirmed in *Leigh v. Independent Ditch Co.*¹ In an action for the diversion of water, the complaint alleged that the plaintiffs were owners and possessors of a certain mining claim situated on a certain stream, and were entitled to have the waters thereof flow as they naturally did, but defendants had diverted them. The defendants demurred to this complaint on the ground that it stated no cause of action, because it did not allege that plaintiffs had appropriated the water, or were owners of it, or were in possession of it. The demurrer was overruled. "The allegation that the plaintiffs were owners and in possession of the mining claim was sufficient. The ownership and possession of the claim drew to them the right to the use of the water flowing in the natural channel of the stream. The diversion of the water was therefore an injury to the plaintiffs for which they could sue. The princi-

¹8 Cal. 323.

ple involved in this case was expressly decided by this court in the case of *Crandall v. Woods*." The court here expressly decided that a riparian proprietor, merely by virtue of his ownership, is entitled to the use of the water without making any actual appropriation. The common-law doctrine, that the right over the stream arises from riparian ownership, and not from any appropriation, is again declared. It is true the land in this case was a mining claim, but the decision was not in the slightest based upon or affected by that fact. In the state of Nevada, the common-law doctrines concerning the riparian rights of private riparian proprietors have been adopted in the most explicit manner by the well-considered decision of the supreme court in the case of *Van Sickle v. Haines*.¹ The court held that a person acquiring the legal title by patent from the United States, to a tract of land bordering on a stream, obtained as a necessary incident of his ownership, and before making any actual appropriation, full right to the water of the stream as a riparian proprietor, superior and complete as against another party, not a riparian owner, who had made a prior appropriation of the waters of the stream while it was entirely public. Extracts from the very able and instructive opinion in this case will be given under a subsequent head.

§ 110. Common-law doctrine of riparian rights obtains in California.

The foregoing series of cases shows, beyond a possibility of question or doubt, that prior to and since the adoption of the Civil Code, the laws of California recognized, protected, and enforced the rights known as the "riparian rights" of private "riparian proprietors" owning lands situated on the banks of natural streams, substantially as they exist at the common law.

The rights thus known as "riparian rights" have been defined;¹ they belong alike and equally to all "riparian proprietors" on the same stream, subject solely to the natural advantage belonging to the upper over the lower proprietor;² they exist as a necessary incident of ownership, even though the proprietors had not as yet made any actual appropriation or diversion of the water;³ they entitle each "riparian proprietor" to the usufruct of the water as it flows in the natural channel of the stream, including the right to use so much of it as may be reasonably necessary for such primary purposes as watering his cattle, domestic and household uses, without thereby unnecessarily or unreasonably diminishing its natural flow down to the proprietors below him on the stream.⁴ Whether these riparian rights include the right to use the water for purposes of irrigation is not directly decided, nor even considered, by these cases.

We are thus furnished with a conclusive answer to a question suggested on a preceding page. I had stated the position maintained by some, that the section 1422 of the Civil Code is *not* in reality restrictive, and can produce *no* practical effect upon the whole legislation of the Code concerning water-rights for two reasons; the first of these being that, under the law of California, independently of the Code, private "riparian proprietors" have no rights as such to the waters of the adjoining stream. The series of decisions above quoted demonstrates the incorrectness of this opinion. These authorities show most clearly that the law of California, independently of the Code, did and does recognize the "riparian rights" of "riparian proprietors" substantially as they exist at the common-law. This conclusion is so certain that no further discussion can render it any more plain.

¹Pope v. Kinman, 54 Cal. 3.

²Id.; Ferrea v. Knipe, 28 Cal. 841; Crandall v. Woods, 8 Cal. 136.

³Creighton v. Evans, 53 Cal. 55.

⁴Pope v. Kinman, Creighton v. Evans, Ferrea v. Knipe, Crandall v. Woods, *supra*.

The legislature, in enacting section 1422, clearly assumed that the then existing law of the state recognized and protected these "riparian rights" of "riparian proprietors."

§ 111. Construction of section 1422.

We are then brought back to a consideration of the question: What are the practical effects, upon the entire legislation of the Code, of the restrictive provision contained in section 1422? In support of the position maintained by some, that this clause is *not* restrictive, and can produce no practical effects upon the legislation as a whole, a second ground has been advanced, namely, that the "rights of riparian proprietors" intended to be saved and protected by the section are simply those which are not inconsistent with the previous sections of the title, and which are not, therefore, taken away and abrogated by these provisions; those rights, in short, which still remain in force after and notwithstanding the preceding and operative sections of the statute. Is this the interpretation which should properly be given to the language of section 1422? In my opinion it is not. Such an interpretation would, in my opinion, be unreasonably forced, and in plain violation of the settled rules governing the construction and interpretation of statutes. In the first place, it is a fundamental doctrine of statutory interpretation that in every distinct, clear, additional provision the legislature must be assumed *to have meant something*; to have intended the provision to have *some* meaning, operation, and effect, so that it is not wholly superfluous, useless, and nugatory. Nothing but absolute necessity, therefore, should ever admit such an interpretation of a clear, distinct, and positive provision as would render it unnecessary, useless, superfluous, and nugatory.

The suggested construction of section 1422 would render the whole clause utterly useless, superfluous, and nugatory. If it were adopted, the section would in effect read: "The rights of

riparian proprietors, so far as they are not taken away or abrogated by the provisions of this title, are not affected by the provisions of this title." It cannot be supposed that the legislature would deliberately, and by a formal and final section placed at the end of a statute, enact a provision so unnecessary and meaningless. Whatever may have been the riparian rights existing previous to the statute, then, as a matter of course, so far as they were not opposed to the provisions of the statute, so far as they were not taken away, abrogated, lessened, or altered by the statute, they would necessarily remain unaffected by its provisions. It needs no express clause to produce this result, which would be inevitable in the absence of such a clause; no clause could make the consequence any more certain or operative. We find the title of the Code concluded by a formal, peremptory, and sweeping final section in the nature of a proviso or limitation upon the operation of the statute as a whole, and it is simply absurd to suppose that the legislature intended by this section nothing but what would have been equally true if the section had been omitted. The correctness of this conclusion will appear even still more clear from a further consideration. The interpretation which I am examining would render section 1422 wholly without meaning, effect, and operation. If the "rights of riparian proprietors" intended to be protected are simply those which are not inconsistent with the previous sections of the title, which are not abrogated, but which still remain notwithstanding the preceding provisions of the statute, then, I say, this section 1422 is utterly useless, and without any force and effect, because there *are no such* "rights of riparian proprietors" remaining unaffected by the title. If the previous provisions of this title are operative to their full extent, unlimited and unrestricted by the final section, then they must inevitably abolish and abrogate all the "riparian rights," and "rights of riparian proprietors," existing at the common law. The

fundamental conception upon which all of the common-law rules are based, and all and singular of the special "riparian rights," and rights of "riparian proprietors" created and regulated by these common-law rules, are alike inconsistent with and opposed to the provisions of this title of the Code, if these are to have their full and natural meaning and operation, unrestricted by the proviso contained in the final section 1422. And, furthermore, the interpretation in question seems to have been, impliedly at least, condemned by recent decisions of the supreme court. In several of the cases above quoted, the causes of action arose since the title of the Civil Code concerning water-rights went into effect. Under the construction which it is claimed should be given to section 1422, the provisions of this title would have been a complete answer to the plaintiff's contention in all of these cases, and would have absolutely controlled their decision. And yet in none of these cases is the title of the Code even suggested or referred to by the court. It is not too much to say that these cases are wholly inconsistent with any interpretation of section 1422, which leaves the preceding provisions of this title fully operative, according to their natural and literal import, upon the rights of private riparian proprietors.¹

§ 112. Riparian rights excepted.

The conclusion, then, seems to be irresistible that the legislature intended section 1422 to have *some* meaning and effect; that they designed it to be a material and substantial limitation upon the otherwise general operation of the preceding clauses of

¹See *Ellis v. Tone*, 58 Cal. 289; *Pope v. Kinman*, 54 Cal. 3; and in other reported cases decided since the Code took effect, but which do not show when the causes of action arose, some reference to this title of the Code

would certainly have been made, if it had the effect to abrogate all riparian rights. See *Creighton v. Evans*, 53 Cal. 55; *Lytle Creek Water Co. v. Perdew*, (Cal.) 2 Pac. Rep. 732.

the title. What are its meaning and its effect? A fair and reasonable construction seems to leave no other alternative but that the section must have all the meaning, force, and effect which can result from the full, settled, and legal import of all its terms, considered as referring to and acting upon the then existing doctrines of the law established by judicial decisions. In other words, the common-law "riparian rights" of private "riparian proprietors" owning tracts of land upon the margins of natural streams in this state, which have been recognized, declared, and maintained by judicial decisions both before and since the Code, are not affected by the title of the Code; do not, in fact, come within the purview of its provisions. In short, the whole title has no relation to, nor effect upon, the rights of those private owners who hold tracts of land bordering upon natural streams, but is confined in its operation to the rights of appropriating and using the waters of streams which flow wholly through public lands of the United States or of the state. There seems to be no escape from this construction unless an entirely different meaning is to be given to the words "rights of riparian proprietors" when found in a statute, from that given by the universal consent of all judicial decisions.

The supreme court has uniformly recognized and maintained the distinction between the common right of all persons to appropriate the water of streams while running wholly through public lands, and the rights of private riparian owners who have acquired private titles to lands on the banks of streams. It has recognized the technical terms "riparian rights" and "riparian proprietors," and has defined them as they have been defined and are understood at the common law. The doctrines decided by the supreme court concerning these "riparian rights" have been summarized on a previous page, and need not be here repeated.¹ There can be no reasonable doubt that these "ri-

¹See *ante*, § 109.

parian rights" of private owners on the banks of streams are referred to by section 1422, are excepted or removed by it from the meaning and operation of the whole title, and are left existing in the law of California as fully and completely as they were before the Code. The title of the Code thus finds its sole application to the water of streams flowing entirely through public lands, upon the banks of which no private owner has yet acquired title to any tract or parcel of private land.

If it be urged that this construction virtually emasculates the entire title of the Code concerning water-rights, and renders it virtually inoperative over a large and most important branch of those rights, the answer is that this is the fault of the legislation, and not of the construction. It is the duty of courts to take statutes as they are, to expound them according to the plain and natural import of their terms, and not to add to or take from them according to any notions which the judges may have as to what the legislature *ought* to have enacted. In the title of the Code under consideration the legislature has undoubtedly shirked its responsibility. Called upon to settle a question of the gravest importance, in which there are directly opposing interests involved, any settlement of which must necessarily be hostile to some large pecuniary interests, the legislature, under a mere appearance,—a *simulacrum* of settlement,—has, in fact, done nothing, but has left all the important questions of private water-rights of private riparian owners in exactly the same position which they occupied prior to the Code. The failure of the legislature to do what it was supposed and desired by some it should do, can have no effect upon the action of the courts in construing and interpreting the statute as a whole. The court cannot enact a new and different statute.

§ 113. Interpretation of section 1422 — Lux v. Haggin.

[The views advanced by our author in the preceding sections have received the sanction of the highest court of California, and are thus in harmony with the authoritative interpretation of this obscure and ambiguous statute. In the case of *Lux v. Haggin*,¹ decided in 1884, it was said by Sharpstein, J.: "After carefully examining all the cases bearing on this question, we are unable to find one in which it is held, or even suggested, that outside of the mining districts the common-law doctrine of riparian rights does not apply with the same force and effect in this state as elsewhere." And the reason why it did not apply to the mining districts is "that the government, being the owner of all the land through which a stream of water runs, had a right to permit the diversion and use of it by any one who chose to divert and use it for mining, agricultural, or other purposes. There is not only no occasion for the application of the doctrine of riparian proprietorship in such a case, but it is one to which the doctrine could not be applied." The court continued: "The provisions of the Civil Code in respect to the appropriation of water must be limited to that which flows over lands owned by this state or by the United States. It cannot affect the rights of riparian proprietors, (1) because it is expressly declared that it shall not; and (2) because an owner of land cannot be divested of any interest which he has acquired in it except for a public use, and not then until just compensation has been made for it."²

¹ 14 Pac. Rep. 919, 923.

² In this case a dissenting opinion was delivered by Ross, J., in which he said: "Of course the doctrine of appropriation, as contradistinguished to that of riparian rights, was not intended to, and in-

deed could not, affect the rights of those persons holding under grants from the Spanish or Mexican government—*First*, because the doctrine is expressly limited to the waters upon what are known as the public lands; and, *secondly*, be-

This case was reargued in 1886; and the opinion then prepared is so exhaustive in its scope, and is characterized by such learning and judicial acumen, that it may almost be said to constitute, in itself, a complete treatise on water-rights. In regard to the point now under consideration, it was held that the water-rights of the *state*, as riparian owner, are not reserved by section 1422 of the Code, because (whenever the state has not already parted with its right to those who have acquired from it a legal or equitable title to riparian lands) the provisions of the Code confer the state's right to the flow on those appropriating water in the manner prescribed by the Code.¹ Further, it was suggested in argument that the "riparian rights" designed to be reserved by section 1422 were such only as had become vested before the Code went into operation, and that, after that date, no genuine riparian rights could be acquired in California. But the court held that the section in question is protective, not only of riparian rights existing when the Code was adopted, but also of the riparian rights of those who had acquired a title to land from the state after the adoption of the Code, and before an appropriation of water in accordance with the Code provisions. This decision was made to rest upon a point not previously considered in any of the cases, but one of such importance and so clear that it seems to terminate the whole controversy. To quote the language of McKinstry, J.: "We do not find it necessary to say that the prospective provisions of the Code would violate the obligation of a contract; but, when the state is prohibited

cause the rights of such grantees are protected by the treaty with Mexico and the good faith of the government. It is the rights of such riparian proprietors as *those* that are unaffected by the doctrine of appropriation, and *those* are the riparian rights that are excepted

from the operation of the provisions of the Civil Code, in relation to water-rights, by section 1422 of that Code." *Lux v. Haggin*, (Cal.) 4 Pac. Rep. 919, 935. But this view cannot be regarded as tenable.

¹*Lux v. Haggin*, (Cal.) 10 Pac. Rep. 739.

from interfering with the primary disposal of the public lands of the United States, there is included a prohibition of any attempt on the part of the state to preclude the United States from transferring to its grantees its full and complete title to the land granted, with all its incidents. The same rule must apply to homesteaders, pre-emptioners, and other purchasers under the laws of the United States. To say that hereafter the purchaser from the United States shall not take any interest in the water flowing to, or in the trees on, or in the mines beneath, the surface, but others of our citizens shall have the privilege of removing all these things, is to say that hereafter the United States shall not sell the water, wood, or ores." The learned judge continued: "The section declares, in effect, that those appropriating water under the previous sections shall not acquire the right to deprive of the flow of the stream those who shall have obtained from the state a title to, or right of possession in, riparian lands, before proceedings leading to appropriation shall be taken. Such is the meaning of the words employed. Our conclusion on this branch of the case is that section 1422 saves and protects the riparian rights of all those who, under the land laws of the state, shall have acquired from the state the right of possession to a tract of riparian land prior to the initiation of proceedings to appropriate water in accordance with the provisions of the Code. If section 1422 of the Civil Code were interpreted as saving *all* riparian rights actually vested before the section took effect, the mere appropriator could acquire no rights to water by virtue of the provisions of the Code, but would be left to the enjoyment of such as he might secure by convention with the riparian proprietors. If all riparian rights existing when the section was adopted were preserved by section 1422, then, inasmuch as both the state and the United States were at that time riparian owners, the lands of neither government would be affected relating to water-rights; nor, of course, would any

subsequent grantee of either government be affected by those provisions.”¹

The common law, therefore, defines and governs the water-rights of all persons owning lands upon a stream in California, where the waters of such stream had not been already appropriated when their titles accrued.]

§ 114. Mexican law—Effect on riparian rights.

[The recognition and enforcement of the common law doctrine of riparian rights, by the legislation and in the courts of California, is not in anywise affected or invalidated by the fact that the laws of Mexico obtained in that jurisdiction before its admission as a state into the Union. If, under the Mexican *regime*, vested rights of property had grown up, of such a nature and to such an extent that the general enactment of the law of riparian proprietorship would have been inconsistent with their continued enjoyment, it is obvious that California would have had no power to destroy these rights by the adoption of the common law, or by its legislation on the subject of waters. But, on the contrary, the Mexican law, as it existed at the time of the cession of California, did not confer nor recognize any inherent vested right, enforceable in the courts, in others than riparian proprietors, to the use of any portion of the waters of a stream, nor any right, except as to those who actually appropriated waters in the manner and on the conditions prescribed by the laws.

This subject was very fully discussed in the recent important case of *Lux v. Haggin*,² where the conclusion above indicated was reached and applied. It was contended by counsel that “the fundamental principle upon which all the laws of the former governments of this territory upon this subject [waters and their uses] were based will be found to be that the flowing wa-

¹*Lux v. Haggin*, (Cal.) 10 Pac. Rep. 674, 744.

²*Id.* 674, 705-718.

ters of the streams and rivers of the country were dedicated to the common use of the inhabitants, subject to that legislative control which is the equivalent of the exercise of that legislative power which we know as the 'police power' of the state." And the court understood this proposition to mean that "the inhabitants" of the territory, or at least the occupants of lands in each valley or water-shed capable of irrigation from a stream flowing in it, had, under the Mexican law, a vested interest in the common use, for irrigation and like purposes, to which the waters were "dedicated," which could not be taken away by the legislative power; that the dedication continues to the present hour; that the state of California has no power to restrict the use to riparian proprietors; that the statute of 1850, adopting the common law as the rule of decision, is not to be construed as an attempt so to restrict the use; and, if it must be thus construed, it is invalid to that extent, since the power of the state is limited to the mere *regulation* of the common use. But the court denied the view contended for, and announced the principle that, "by the law of Mexico, the running waters of California were not dedicated to the common use of all the inhabitants in such sense that they could not be deprived of the common use."

This doctrine was supported upon substantially the following reasoning: By the Roman law, three things, viz., air, running water, and the sea, (with its shores,) were considered as common to all. But the Roman jurists made a distinction between *res communes* and *res publicæ*, including the sea among the former and rivers among the latter. The same distinction was recognized by the Spanish writers,—*bienes comunes* being those which, not being, as to ownership, the property of any, pertain to all as to their use,—as the air, rain, water, the sea, and its beaches; and *bienes públicos* being those which, as to property, pertain to a people or nation, and, as to their use, to all the individuals of the territory or district,—such as rivers, shores,

ports, and public roads. And by the Mexican law the property in rivers pertained to the nation; the use, to the inhabitants. Now, whatever the common use to which rivers, harbors, and public roads were subjected, the enjoyment of such use would exclude the notion of an exclusive use or occupation which must interfere with a like use by others. But the common use of rivers would seem to be such as all could enjoy who had access to them *as rivers*. An eminent English judge speaks of a distinction mentioned by the civilians between a river and its waters; the former being, as it were, a perpetual body, and under the dominion of those in whose territory it is contained; the latter continually changing, and incapable, while it is there, of becoming the subject of property; and he adds: "It seems that the Roman law considered running water not as a *bonum vacans*, in which any might acquire a property, but as public or common, in this sense only, that all might drink it, or apply it to the necessary purposes of supporting life; and that no one had any property in the water itself, except in that particular portion which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only."¹ The common use of the waters, it would seem, existed only while they continued to flow in, and constituted a portion of, the river; but under the Mexican law an exclusive use of parts or the whole of the waters of a river might be legally acquired by individuals. By the Mexican Civil Code of 1870 it is provided: "The property in waters which pertains to the state does not prejudice the rights which corporations or private individuals may have acquired over them by legitimate title, according to what is established in the special laws respecting public property. The exercise of property in waters is subject to what is provided in the following acts." Article 1066. If, as is probable, the presumption is that the provisions of the

¹Denman, J., in *Mason v. Hill*, 5 Barn. & Adol. 1.

Code are declaratory of the pre-existing law, the right which could be acquired under the laws to the separate use of the portions of a stream constituted an exclusive usufruct, of the nature of private property, which did not and could not co-exist with a common use of such waters by all.¹ The court then continued: "It was the policy of Mexico to foster and protect navigation. The rivers naturally adapted to the passage of watercraft were devoted to the common use for purposes of navigation. It would seem to be in the *power* of the sovereign (except so far as the power is limited by the constitution of government) to authorize such diversions as shall interfere with navigation. It was never doubted that an act of parliament would operate to extinguish any public right to passage. Woolr. Waters, 289. While, however, a river remained a navigable river, the navigation was, by the civil law, common to all, unless the privilege was limited to a class. Interference with the appropriate use of innavigable rivers was not thus absolutely prohibited by the Mexican law. The common use of the waters of such rivers by all who could legally gain access to them continued only while the waters legally flowed in their natural channel, and the power of determining whether the public good—the purposes for which the social state exists—demands that the use of the whole or portions of the waters should pass as an exclusive right to one or a class of individuals remained in the sovereign. Whether the power is an incident to the ultimate domain or right of disposing of the property of the state, or is to be referred to some other source or principle, the Mexican government employed the power of permitting the diversion of waters from innavigable streams, by those not riparian proprietors, upon

¹ Among the authorities cited by the court are the following: 2 Just. Inst. 1, §§ 1, 2; Hal. Int. Law, 147; Moyle, Just. 184; Eseriche; Hall, Mex. Law, 447; Vinnius,

Comm. Inst.: Mason v. Hill, 5 Barn. & Adol. 1; Bow. Mod. Civil Law, 64; Mex. Civil Code, art. 1066. See, also, Sand. Just. 157, 159.

such terms and conditions, and with such limitations, as were established by law, or by usages and customs which had the force of law. That government saw fit to concede private rights to the exclusive use of the waters of such streams. It had *power* to do this, even if the consequence should be the entire deprivation of the common use. It may be said that the Mexican laws which provided for such concessions to individuals or corporations did not provide for *grants* to such persons, but were themselves a recognition of a right in all to a use of the waters. But a system which provided for the mode of acquisition of private, separate, and exclusive rights by individuals or corporations cannot be said to be merely in regulation of a common use. Those who appropriated and diverted the waters of an innavigable river in accordance with the laws, obstructed *pro tanto* its common use. Nevertheless they acquired an exclusive right to the use of that which they diverted, because, if they complied with the established conditions, their rights were acquired under and in accordance with law, and the waters they diverted were no longer portions of the waters of a river, or subject to the common use. No one of such had any right in or to the water until he had complied with the conditions which authorized him to appropriate it. Every one of such who complied with the conditions, and appropriated water, acquired a vested right in such water, at least while he continued to use it, except in the single case where he acquired a right merely conditional, under laws which reserved the power in the agents of the state or municipality to deprive him of it without indemnification."¹]

§ 115. Riparian rights in Kern district.

[We have shown that the common law regulates the rights of riparian owners on the rivers and streams of California, un-

¹Lux v. Haggin, (Cal.) 10 Pac. Rep. 705-711.

affected by the provisions of the Civil Code. It is also held that the common law as to riparian rights was not abrogated by certain statutes of the state applicable to a district of country within which is included the county of Kern, nor was the state estopped by such statutes from asserting its right to the flow of a natural stream from that district to and over the lands granted to the state by the act of congress of 1850.¹]

§ 116. Common law of England.

[The rights of riparian owners in California are to be determined by the common law, because these rights are excepted from the operation of the Code, and because the common law was adopted as the rule of decision in that state by the act of April 13, 1850. This statute, it is held, adopts the common law of England, not the civil law, nor the "ancient common law" of the civilians, nor the Mexican law, nor any hybrid system. And in ascertaining the common law of England, say the court, "we may and should examine and weigh the reasoning of the decisions, not only of the English courts, but also of the courts of the United States, and of the several states, down to the present time." "The report of the proceedings of the legislature shows that there was a considerable minority in favor of the adoption of the civil law; and there are circumstances appearing from the proceedings tending to prove that the advantages of each system, as the fundamental law of the future, were discussed and fully considered. Under these circumstances, we must believe that, if it had been intended to exclude the common law as to the riparian right, the intention would have been expressed. Moreover, it is a well-established principle that, when the legislature of this state has enacted a statute like one previously existing in other states, the courts here may look to

¹Lux v. Haggin, (Cal.) 10 Pac. Rep. 735

the interpretation of such statute by the courts of the other states."¹]

§ 117. Who are riparian owners.

[Where a party has a contract for the purchase of lands adjoining a river, upon conditions not yet fulfilled by him, he has not yet acquired the fee, and cannot invoke the doctrine of riparian rights in his favor.² But one who, though not a riparian owner, derives his right to the use of running water from a riparian proprietor, may restrain an interference with such right by an upper riparian proprietor who uses the water for purposes not riparian.³ So where adjoining land-owners agree that the waters of a certain stream be taken to a reservoir on the land of one of them, and that the other shall conduct half of the water through ditches to his land, these are covenants that run with the land, and the successor of either party has no right to go to a point higher up than where the stream reaches their adjoining lands, and convey the water to his land by some different means, and claim the whole of it for his own use.⁴]

§ 118. Prescriptive water-rights.

[While the common law recognizes no such thing as an exclusive right acquired by mere priority of appropriation of water, it must be remembered that the riparian owner may obtain exclusive interests in the stream by grant or by prescription. In regard to the last named it is said: "The right acquired by prescription is only commensurate with the right enjoyed. The extent of the enjoyment measures the extent of the right. The right gained by prescription is always confined to the right as

¹Id. 746, 749.

²Smith v. Logan, 18 Nev. 149, s. c. 1 Pac. Rep. 678.

³Williams v. Wadsworth, 51 Conn. 277.

⁴Weill v. Baldwin, 64 Cal. 476, s. c. 2 Pac. Rep. 249.

exercised for the full period of time required by the statute, which is, in this state, five years. A party claiming a prescriptive right for five years, who, within that time, enlarges the use, cannot, at the end of that time, claim the use as enlarged within that period."¹ The owner of a mill-dam cannot acquire a right by prescription to overflow adjoining lands while they belong to the United States or to the state.² And so, if a party has acquired by prescription a right to divert water so that it flows into a creek running through his neighbor's land, such prescriptive right does not extend to the overflowing of the water over such land to the neighbor's injury.³

II. USES TO WHICH THE WATER MAY BE PUT.

§ 119. General statement of riparian rights—*Van Sickie v. Haines*.

It thus appearing that the title of the Code concerning water-rights has no application to nor operation upon the riparian rights of private riparian proprietors who hold the title to tracts of land on the banks of natural running streams in this state; that those rights are left existing as they have been declared by judicial decisions made before and since the adoption of the Code; and that those rights have thus been declared by judicial decisions to be substantially the same as the rights created, recognized, regulated, and protected by the common-law doctrines relating to the subject,—we are now in a position to inquire, with more of detail, what are the nature, extent, and limits of the rights held by private riparian proprietors in California; what uses of the water of streams do they confer, permit, or for-

¹ *Boynton v. Longley*, (Nev.) 6 Pac. Rep. 437, Hawley, J.

² *Wattier v. Miller*, 11 Or. 329, s. c. 8 Pac. Rep. 354.

³ *Tucker v. Salem Flouring-Mills Co.*, 13 Or. 28, s. c. 7 Pac. Rep. 53.

bid; with special attention to the inquiry whether they permit the use of water for purposes of irrigation, and, if so, to what extent and under what limitations. As a preliminary to this proposed examination, I shall quote at some length from a decision made by the supreme court of Nevada, which covers all of the questions. The same physical conditions affecting the use of water exist in both states, and in both the common-law doctrines concerning the rights of private riparian proprietors are recognized as substantially controlling. These facts alone would recommend the decision to the attention of the courts and profession of California; but the decision itself is so important, and the opinion of Chief Justice Lewis is so able, learned, and exhaustive, that no excuse is needed for the long extracts which I have made. If the common-law doctrines still determine and regulate the rights of private riparian proprietors in our own state, it is proper to know what these doctrines are, how they have been settled, and upon what authority they rest. The facts of the case present in a marked manner the distinction between the appropriation of water from streams while flowing wholly over the public lands of the United States, and the rights to the water held by a proprietor who has acquired a title as private owner to a tract of land bordering upon a stream. The opinion shows in the clearest manner the general nature, extent, and limits of the rights possessed by such private riparian proprietor, as established by the overwhelming *consensus* of authorities, English and American. Unless I am entirely wrong in the construction placed upon the title in the Civil Code, and unless the decisions of the California supreme court, heretofore quoted, are to be wholly disregarded, then, as it seems to me, the opinion of Chief Justice Lewis, in its reasoning and its conclusions, applies to and defines the rights of private riparian proprietors in California, with one modification, to be subsequently mentioned, growing out of a more recent statute of con-

gress. The case to which I refer, and from which I now proceed to quote, is *Van Sickle v. Haines*.¹

The facts were briefly as follows: In 1857 the plaintiff, Van Sickle, diverted a portion of the waters of Daggett creek, a natural innavigable stream, by means of a ditch for irrigating and domestic purposes, to be used upon a tract of land in his possession not situated upon the banks of said creek. The diversion was made at a point then on the public land, but the tract of land bordering on the creek and including this point was, in 1864, conveyed by patent from the United States to the defendant Haines. In 1865 Van Sickle obtained a patent from the United States for the tract in his possession,* on which he used the water. In 1867 Haines constructed a flume on his own land, and by its means diverted the water of the creek for the benefit of his own riparian tract of land, and thereby deprived Van Sickle of the supply of water which he had been using. In 1870 Van Sickle brought an action, which resulted in a judgment for damages against Haines, and a perpetual injunction restraining him from interfering with the plaintiff's prior appropriation. It should be carefully noticed that the plaintiff, Van Sickle, was not a riparian proprietor. On appeal, the judgment was reversed by the supreme court, and a decree was ordered for the defendant dismissing the suit. The court held, among other points, that, since there can be no title acquired by adverse user against the United States, the time during which a person diverts water from a stream wholly on the public land, previous to the issue of a patent to a private riparian proprietor, cannot be set up as an adverse user against such patentee. The same has been held by California decisions.² The plaintiff presented a petition for a rehearing, and thereupon a second most able and exhaustive opinion by Lewis, C. J., was

¹7 Nev. 249.

²*Pope v. Kinman*, 54 Cal. 3.

delivered, from which I shall quote several passages that seem to bear upon the general questions under discussion. This opinion opens with some preliminary observations which are peculiarly appropriate and instructive, (pages 257, 258:) "We are unable to understand from the petition what exact condition is assigned to running water in the catalogue of rights or property; or what the nature of the title which may be acquired to it, if any. Much thereof is devoted to showing that there can be no property in running water; that it is, and must of necessity remain, common to all; that it is a thing 'the property of which belongs to no person, but the use to all;' and in the same sentence it is said that it 'is *publici juris*, *res communis*, and *bonum vacans*.' This *abandon* in the use of legal expressions is evidently the result of a radical misunderstanding of the signification which is given to them in the books of law. True, it is often said that water is *publici juris*, or belongs to those things which are *res communes*; but how it can be either *publici juris* or *res communis* and also *bonum vacans* is a problem not yet solved in the science of the law. If common property, or, as argued by counsel, something in which no one has an absolute property, but every one has the use, the right to the use must then certainly be in the community; but *bonum vacans* is a thing without an owner of any kind, and which belongs absolutely to the person who may first find or appropriate it, and he has the complete right of property in it as against the world. It is a flat contradiction, in terms, to say that running water is at the same time common property and *bonum vacans*. But we have the word of Lord Denman in *Mason v. Hill*,¹ and of Baron Parke in *Embrey v. Owen's Ex'rs*,² that it was never considered *bonum vacans*. Nor are these contradictions confined simply to legal terms. The argument proceeds upon the assump-

¹ 5 Barn & Adol. 22.² 6 Exch. 353.

tion that running water belongs to the community generally, and authorities are cited which are supposed to sustain that doctrine, as the quotation from Blackstone, who says, 'water flowing is *publici juris*. By the Roman law, water, light, and air were *res communes*, and which were defined things, the property of which belongs to no person, but the use to all.' Yet, after arguing to show that water is common property, it is also claimed that a stream may be absolutely appropriated by the first person who may wish to use it. In other words, that water, instead of being something which belongs to all in common, as is argued at first, is a thing which belongs absolutely to him who first appropriated it, to the extent even that, if it be necessary for the purpose for which the appropriation is made, it may be completely consumed. Surely, the two propositions are as irreconcilably contradictory as any that can be named. As an illustration, it is argued that running water is like the air, to which certainly all have an equal right, and with which no one has the right to interfere to the injury of another. But in this case the right is claimed by Van Sickles to deprive the appellant of the stream, which in the ordinary course of things he would be enabled to enjoy, and to appropriate it exclusively to himself. If running water be like the air, then surely no one has the right to interfere with it in its natural state to the prejudice of others. When positions so utterly contradictory are assumed, the real questions in the case are likely to be involved and obscured, rather than elucidated." The following observations concerning the influence which the "public interests" should have upon the decisions of cases involving private rights, are of weighty importance in this community as well as in Nevada and every other state. While courts most certainly have a legislative function, since the great body of common law and of equity has been built up by courts, it should never be forgotten that courts do not rightfully possess the

power of legislating *from motives of mere policy or expediency*. The duty of courts is to declare and protect private rights of suitors by applying or extending some established principle or doctrine to new conditions of facts. The court say, (page 259:) "Before proceeding to an investigation of the legal questions really involved in the case, we may state, once for all, that, the fact that the case is of great interest to the public, whose rights, it is claimed, 'are seriously disturbed by the decision,' is a consideration which, in very doubtful cases, may, and perhaps should, have some weight with judicial tribunals. But that the interests of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the state should be sacrificed to the weal of the many, is a doctrine which, it is to be hoped, will never receive sanction from the tribunals of this country. The public is in nothing more interested than in scrupulously protecting each individual citizen in every right guarantied to him by the law, and in sacrificing none, not even the most trivial, to further its own interests. Every individual has the right, equally with the public at large, to claim a fair, impartial consideration of his case; for the rights of the public are no more sacred, or entitled to greater protection in law, than those of the individual; and therefore, in actions between individuals, the consideration of public interest has weight only when there is grave doubt as to where the right lies. This doctrine which would justify the courts in depriving a person of a civil right to-day for the public good, might to-morrow force them to sacrifice his life to the clamor of a mob; which would deprive Haines of his property at one time, might operate against Van Sickel at another. As in this case we have no doubt whatever as to what should be our conclusion, the fact that it may injuriously affect the public can have no weight in its consideration. Happily, however, we do not think the decision, if properly un-

derstood, will produce the general disastrous results apprehended by counsel." Coming to the merits of the case, the learned chief justice states the material questions to be considered and determined, (page 260:) "As the appellant claims the water of Daggett creek as an incident to the land patented to him by the United States, and as it is admitted that he could get only such title and right as was vested in the United States itself, it becomes necessary to ascertain what is the nature of the rights of the federal government to the public land, and we purpose to show (1) that the United States has the absolute and perfect title; (2) that running water is primarily an incident to or part of the soil over which it naturally flows; (3) that the right of the riparian proprietor does not depend upon the appropriation of the water by him to any special purpose, but that it is a right incident to his ownership in the land to have the water flow in its natural course and condition, subject only to those changes which may be occasioned by such use by the proprietors above him as the law permits them to make of it; (4) that the government patent conveyed to Haines not only the land, but the stream naturally flowing through it; (5) that the common law is the law of this state, and must prevail in all cases where the right to water is based upon the absolute ownership of the soil." The chief justice follows this statement by an elaborate argument and citation of authorities showing that the United States has the absolute title in fee-simple in all the public lands, to the same extent and in like manner as any private owner has; and that this title includes all the incidents and power of absolute private ownership, (pages 261-264.) As the correctness of these conclusions is undoubted, it is unnecessary to quote this portion of the opinion. He then proceeds to consider the right to water as an incident of ownership, (page 264:) "Being absolute owner of the soil, the source of all title thereto, and entitled to all the remedies for its protection and preserva-

tion which are given to any individual owner, it certainly cannot be maintained that the United States is not equally entitled to everything which is naturally such an inseparable incident to the land that it is frequently spoken of as a part of the soil itself. Such an incident is a natural water-course. It passes by deed of the soil without any mention, and forms as marked a feature of the land through which it passes as the trees upon it or the vegetation which it nourishes. Nothing more readily recommends itself to the understanding than that an element which the laws of nature have connected with the freehold, and which, without any effort on the part of man, clothes it with refreshing verdure,—when without it there must be only forbidding nakedness; creating fertility and productiveness where otherwise there would be only sterility; at once administering pleasure and affording profit,—is necessarily a part of or incident to his land. This is the natural effect of running water, independent of any use which may be made of it in administering to the immediate wants of man and beast. How frequent is it that small streams of water are found to add immeasurably to the value of estates, even where no particular use is made or intended to be made of them. It is very seldom, indeed, that they do not to some extent enhance the value of real property, and they are frequently esteemed invaluable. * * *

How can it be said, then, that a water-course is not essentially a part of the freehold itself. That it is so, the authorities bear abundant witness. We do not wish to be understood as saying that there is such an absolute property in the water that the whole stream may be destroyed by a riparian proprietor, so that others below him will be deprived of it; but that it is an incident of his land to the extent that he has the right to have it continue to flow in its natural course, subject to such changes only as may be occasioned by such use of it as the law allows the various proprietors to make, as it passes along, and which

will be hereafter more fully explained. In this sense only is the right to be understood, when spoken of in the authorities about to be quoted." The opinion then quotes numerous authorities, and it may not be inappropriate to copy those which are cited from American decisions.

After quoting the general definitions given by Lord Coke and by Mr. Angell, the chief justice proceeds, (page 266:) "The supreme court of Ohio says:¹ 'The uses of the waters of private streams belong to the owners of the land over which they flow. They are as much individual property as the stones scattered over the soil.' Chancellor Kent says:² 'A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseized but by the lawful judgment of his peers, or by due process of law.' It is said in the note to *Ex parte Jennings*:³ 'The general distinction deemed of so much excellence and importance by these learned judges, and which at this day no lawyer will hazard his reputation by controverting, is that rivers not navigable—that is, fresh-water rivers of what kind soever, do of common right belong to the owners of the soil adjacent, to the extent of their land in length; but that rivers where the tide ebbs and flows belong of common right to the state.' In *Wadsworth v. Tillotson*,⁴ speaking of the rights to a water-course, the supreme court says: 'This right is not an easement or appurtenance, but is inseparably annexed to the soil, and is parcel of the land itself.' Chief Justice Shaw says:⁵ 'The right to flowing water is now well settled to be a right incident to property in the land.' In another case the same judge says:⁶ 'It is inseparably annexed to the soil, and passes with it, not as an easement or as an appur-

¹ *Buckingham v. Smith*, 10 Ohio, 297.

² *Gardner v. Village of Newburgh*, 2 Johns. Ch. 166.

³ 6 Cow. 543.

⁴ 15 Conn. 372.

⁵ *Elliot v. Fitchburg R. R.*, 10 Cush. 193.

⁶ *Johnson v. Jordan*, 2 Metc. 239.

tenance, but as parcel. Use does not create it, and disuse cannot destroy nor suspend it.' The supreme court of North Carolina says:¹ 'The right is not founded in user, but is inherent in the ownership of the soil, and, when a title by use is set up as against another proprietor, there must be an enjoyment for such a length of time as will be evidence of a grant.' * * * 'The common right here spoken of is not that existing in all men in respect to things *publici juris*, but that common to the proprietors of the land on the stream. And, as between them, the use to which one is entitled is not that which he happens to get before another, but it is that which, by reason of his ownership of the land on the stream, he can enjoy on his land and as appurtenant to it.' The supreme court of Vermont say:² 'The owner of land has rights to the use of a private stream running over his land peculiar to himself as owner of the land, not derived from occupancy or appropriation, and not common to the whole community. It is the right to the natural flow of the stream. Of this right he cannot be deprived by the mere use or appropriation by another, but only by grant, or by the use or occupancy of another, for such length of time as that therefrom a grant may be presumed.'" The right to the water of running streams being thus an incident of ownership by a riparian proprietor is held by the United States as completely as by any private owner, and necessarily passes to its grantee by the patent which conveys the full legal title to the tract of land bordering on the stream. In examining still more closely the nature of the right, and showing that it does not depend upon actual use or appropriation of the water by a riparian owner, the learned chief justice most ably proceeds as follows, (pages 268-272:) "If a stream be an incident to the land, it can no more be diverted, simply because it cannot be presently used by the

¹Pugh v. Wheeler, 2 Dev. & B. 55.

²Davis v. Fuller, 12 Vt. 178.

person owning the land, than he can be deprived of any other property for the same reason. The whole argument on this point evidently originates out of an utter misunderstanding of what is meant by the language, when it is said that the riparian proprietor 'has no property in the water itself, but simply a usufruct while it passes along.' The reason for this expression is this: that as each proprietor has a right to the flow of the stream through his land as it was wont to flow, as it is the common property of all the owners of the soil through which it passes, no one of them can have such a property in the water as will entitle him to consume or divert it all from those on the stream below him, as he might do if he had an absolute property in the water itself; hence the expression so often used. It is, however, never employed as limiting the entire right of the riparian proprietor to the *mere use* of the water. He has another right, and one which is universally admitted; that is, the right to have the stream continue to flow through his land, irrespective of whether he *may* need it for any special purpose or not. He has the right to the natural benefit which a stream affords, independent of any particular use, for the fertility which its natural flow imparts to the soil. In other words, his right has a double aspect: *First*, the right of having the course of the stream continued through his land, which is absolute and complete, as against all the world; and, *secondly*, the right to make such use of the water, as it passes through his land, as will not damage those who are located on the same stream, and are entitled to equal rights with himself. If this be not the character of his right, what is to be understood by the maxim too often quoted, and which lies at the foundation of water-rights, *aqua currit et debet currere ut currere solebat*? This is substantially that no man has the right to divert a stream from its natural course; for to say that water should be permitted to run as it used to, is a prohibition upon all to divert it from its course; and

thus the very maxim shows the proprietors have the right to claim that the stream shall be permitted to run through their land in its natural channel, independent of whether they make any particular use of it or not. Suppose there be a water-fall or water-power upon a tract of land, and it may be supposed that the tract is valuable only for a mill-site, but is not presently used, will it be said that its whole value may be destroyed by the diversion of the water, or that a valuable mineral spring, which is not yet used, may be abstracted from it, and that the owner had no remedy, simply because he had not appropriated it to some useful purpose when the diversion or abstraction took place? Indeed, the authorities are, without exception, that the right to have the water flow in its accustomed channel does not depend upon the fact that any special use is or may be made of it by the proprietors; and no case, no *dictum*, and no intimation of opinion to the contrary, when rightly understood, can be found in the books. It is said by Mr. Phear¹ 'that every riparian proprietor has a right, whether he uses the stream or not, to have its natural conditions within his own limits preserved from sensible disturbances arising from acts on the part of the riparian proprietors, whether above or below, or on the opposite banks.' The court of king's bench say:² 'The proposition that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in *this* sense, viz., that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in any other case of injury to real property, possession is a good title against a wrong-doer, and the owner of the land who applies the stream that runs through it to the use of a mill newly erected, or to other purposes, if the stream is diverted or obstructed, may recover for the consequential injury

¹Phear, Water-Courses, 31.

²Mason v. Hill, 5 Barn & Adol. 11.

to the mill. *But it is a very different question whether he can take away from the owner of the land below one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil even where unapplied, and deprive him of it altogether by anticipating him in its application to a useful propose.* If this be so, a considerable part of the value of an estate might at any time be taken away; and by parity of reasoning a valuable mineral spring might be abstracted from the proprietor in whose land it rises, and converted to the profit of another.' Mr. Justice Creswell says:¹ 'It appears to us that all persons owning lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not.' And Lord Ellenborough says:² 'The general rule of law as applied to this subject is that, independent of any particular enjoyment used or to be had by another, every man has a right to have the advantage of a flow of water in his own land.' The supreme court of Massachusetts says:³ 'If the use which one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below by diminishing the value of his land, though at the same time he has no mill or other work to sustain present damage, still, if the party then using it has not acquired a right by grant, or by actual appropriation and enjoyment for twenty years, it is an encroachment on the right of the lower proprietor for which an action will lie.' The learned Chief Justice Ruffin of North Carolina says upon this point:⁴ 'The argument of the counsel, however, assumes that the right to water can be acquired only by use, and therein we think consists its error. The *dicta* on which he

¹Sampson v. Hoddinott, 1 C. B. (N. S.) 611.

²Bealey v. Shaw, 6 East. 208.

³Elliot v. Fitchburg R. R., 10 Cush. 191.

⁴Pugh v. Wheeler, 2 Dev. & B. 50.

relies had reference to the cases of prescriptive title, or where the party had only the rights of a possessor. But it is not true that the right to water is acquired only by its use, and that it cannot exist independent of any particular use of it. That doctrine is correctly applied to the air and to the sea, or such bodies of water as from their immensity cannot be appropriated by individuals, or ought to be kept as common highways for the constant use of the country and the enjoyment of all men. In such case particular persons cannot acquire a right,—that is, a several and exclusive right, by use or any other means; but with smaller streams it is otherwise. They may still be *publici juris*, so far as to allow all persons to drink the water and the like, and also so far as to prevent a person to whose land it comes from thus consuming it entirely by applying it to other purposes than those for which it is conceded to every one, *ad lavandum et potandum*, as to divert or corrupt it.’ And the supreme court of New York says:¹ ‘A person through whose farm a stream naturally flows is entitled to have it pass through his land, although he may not require the whole or any part of it for the use of machinery. Upon any other principle this right to the stream, which is as perfect and indefeasible as the right to the soil, would always depend upon the use, and a party who did not occupy the whole for special purposes would be exposed to have the same diverted by his neighbor above him without remedy, and which diversion by twenty years’ enjoyment would ripen into a prescriptive right beyond his control, and thereby defeat any subsequent use.’ Such is the invariable rule, iterated and reiterated through all the books, and of which there seems to be no denial. These cases show that the owner of soil can insist upon having the stream continue to run through his land as it was wont, independent of any special use of it.

¹Crooker v. Bragg, 10 Wend. 260. See, also, Corning v. Troy Iron & Nail Factory, 40 N. Y. 191.

The fact, as stated by Chief Justice Ruffin, that he is necessarily and at all times using the water running through his land, in so far at least as the water imparts fertility to the soil and enhances its value, is a sufficient user to entitle him to claim that he shall not be deprived of it."

The learned judge then proceeds to discuss at length the effect of certain territorial legislation, but this portion of his opinion I omit, since it has no bearing upon any general questions. The conclusion of his opinion touches upon a subject of great interest in the state of California, and I shall therefore quote it at length, (pages 284-287:) "It is said that the rule which is adopted in this case may be the rule of the common law, but that it is not applicable to our situation, and therefore should not be followed. We have shown that a stream is an incident of the land through which it naturally flows; that it is, in fact, a part of the soil itself; that the right to have it continue to flow is as sacred a right as that to the soil itself; that, being so an incident of the land, it necessarily passes by conveyance of the land. Such being the law, we are unable to understand how or by what authority this court can say the patent of the United States does not convey as complete and perfect a title to its patentee in the state of Nevada as it does elsewhere. There is no rule within our knowledge which would justify a court, independent of any common-law principle, in holding that the appellant Haines should not have the benefits of a stream of water which the paramount proprietor of the soil grants to him by its letters patent. It might as well be said that the courts can deprive him of the land itself by holding that it did not pass by the patent, as to rule so respecting that which is universally admitted and held to be an inseparable and valuable incident to it. But *perhaps* it is an unwarranted conclusion drawn from our opinion in this case, namely, that the water of a stream could not be used by the riparian proprietor for *irrigation*, which is thought to be inappli-

cable to the condition of things in this state. To this it may be answered—*First*, that no such decision has been made, nor has anything of the kind been intimated; *second*, whatever the common-law rule may be, whether applicable or not, it is made the law of this state, and is as binding on us as is any statute ever adopted by the legislature; and therefore we have no more power to annul or repudiate it than we have to disregard a legislative act. The first legislature of the territory of Nevada (see St. 1861, p. 1) declared that ‘the common law of England, so far as it is not repugnant to or inconsistent with the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory.’ Our state constitution adopted this by section 2 of the schedule. Hence, although the common law might, in the opinion of judges, be inapplicable, still, if not in conflict with the constitution or laws of the United States, or the constitution or laws of Nevada, it must nevertheless be enforced. But suppose that decision should necessitate the adoption of the common law respecting the manner in which running water may be used by those having the right to it; although it may operate unjustly in some cases, still, *as a general rule, none more just and reasonable can be adopted for this state.* It is a rule which gives the greatest right to the greatest number, authorizing each to make a reasonable use of it, providing he does no injury to the others equally entitled to it with himself; while the rule of prior appropriation would authorize the first person who might choose to make use of or divert a stream, to use or even waste the whole, to the utter ruin of others who might wish it. The common law does not, as seems to be claimed, deprive all of the right to use, but, on the contrary, allows all riparian proprietors to use it in any manner not incompatible with the rights of others. When it is said that a proprietor has the right to have a stream continue through his land, it is not intended to be said

that he has the right to *all* the water, for that would render the stream which belongs to all the proprietors of no use to any. What is meant is that no one can absolutely divert the whole stream, but must use it in such a manner as not to injure those below him. As the right is equal in each owner of the land, because naturally each owner can equally enjoy it, so one must exercise that right in himself without disturbing any other above or below in his natural advantages. Chief Justice Shaw says:¹ ‘The right of flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such a character that while it is common and equal to *all through whose land it runs*, and no one can obstruct or divert it, yet, as one of the beneficial gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down, whose said just and reasonable use may often be a difficult question, depending on various circumstances. * * * It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation. But that we think an abstract question, which cannot be answered either in the affirmative or negative as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietor of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly obstruct or divert the water-course, or take such an unreasonable quantity of water, or make such unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive

¹ Elliot v. Fitchburg R. R., 10 Cush. 193.

from it if not diverted or used 'unreasonably.' This is the doctrine uniformly recognized both in England and in the United States, and is the necessary result of the general principles universally recognized respecting running water. Whether the right to irrigate land can in this state be considered a 'natural want,' is a point in nowise involved in this case, and which, therefore, does not call for decision." In conclusion, the learned judge shows that the early decisions in Nevada and a series of cases in California have no bearing whatever upon the questions concerning riparian rights, since they related exclusively to the appropriation of water of streams wholly public, by parties who were not riparian proprietors. It has already been shown that the California courts make the same distinction. As throwing light upon the discussion, and as supporting his positions, the chief justice cites a long list of cases, which for purposes of reference I have thought proper to place in the foot-note.¹

§ 120. Modifications on doctrine of *Van Sickle v. Haines*.

The decision in *Van Sickle v. Haines* is subject to some modification, in respect to one of its conclusions, by the legislation of congress. The court expressly held that a patent granted by the United States to a private person, conveying the full legal title to a tract of what had been public land situated on the

¹Mason v. Hill, 3 Barn. & Adol. 305; 5 Barn. & Adol. 1; Sampson v. Hoddinott, 1 C. B. (N. S.) 611; Embrey v. Owen, 6 Exch. 353; Wright v. Howard, 1 Sim. & S. 190; Davis v. Getchell, 50 Me. 602; Heath v. Williams, 25 Me. 209; Lick v. Madden, 25 Cal. 209; Blanchard v. Baker, 8 Greenl. 253; Davis v. Fuller, 12 Vt. 178; Snow v. Parsons, 28 Vt. 459; Tillotson v. Smith, 32 N. H. 90; Gerrish v. New Market

Manuf'g Co., 30 N. H. 478; Ingraham v. Hutchinson, 2 Conn. 584; Parker v. Hotchkiss, 25 Conn. 321; Wadsworth v. Tillotson, 15 Conn. 366; King v. Tiffany, 9 Conn. 162; Elliot v. Fitchburg R. R., 10 Cush. 191; Tyler v. Wilkinson, 4 Mason, 397; Webb v. Portland Manuf'g Co., 3 Sum. 189; Gardner v. Village of Newburgh, 2 Johns. Ch. 163; Ex parte Jennings, 6 Cow. 518; Canal Appraisers v. People, 17 Wend.

bank of a stream, although all the rest of the land on its banks was still public, *ipso facto*, and necessarily, so far as the patentee's riparian rights to the stream were concerned, cut off and annulled all rights to use the waters of the same stream as a public stream acquired by prior appropriation, and held by parties who were not private riparian proprietors. The reasons for the conclusion were that the appropriation of the waters of streams running over the public lands was wholly permissive; the right of the appropriator could never become complete against the United States by adverse use, but it was a new license or privilege, subject to be revoked and abrogated at any time by the United States; and that a patent, by which the full legal title of the United States, with all of its incidents, was conveyed to the patentee, necessarily clothed such patentee with all rights over the land which had belonged to the United States, and conveyed to him the land entirely free from all claims to the water of the stream growing out of the prior appropriation and uses. On principle, and in the absence of contrary legislation, the correctness of this ruling cannot be doubted. It has, however, been modified within certain limits by a statute of congress referred to twice in a previous chapter. This statute provides, in substance, that the waters of public streams may be appropriated, under local customs and laws, for various purposes connected with mining; and that, when such appropriations have been made from the waters of a public stream, patents subsequently issued by the United States to private persons shall be subject to the rights of the appropriator, and conditions

570; 5 Wend. 423; *Rogers v. Jones*, 1 Wend. 237; *People v. Canal Appraisers*, 13 Wend. 355; *Crooker v. Bragg*, 10 Wend. 260; *Arnold v. Foot*, 12 Wend. 330; *Commissioners v. Kempshall*, 26 Wend. 404; *Corn- ing v. Troy Iron-Works*, 34 Barb.

486; 40 N. Y. 204; *Campbell v. Smith*, 3 Halst. 140; *Plumleigh v. Dawson*, 1 Gilman, 544; *Pugh v. Wheeler*, 2 Dev. & B. 50; *Board of Trustees v. Haven*, 11 Ill. 554; *Moffett v. Brewer*, 1 Greene, (Iowa,) 348.

reserving or protecting such existing rights shall be incorporated into the patent.¹ The result is that when the waters of a stream flowing wholly over the public land have been appropriated for a purpose recognized and protected by the statutes of congress, and a patent is subsequently issued by the United States to a private person conveying the title to a tract of land on the banks of the same stream, the patentee takes his title, and must enjoy his rights as a riparian proprietor subject and subordinate to the already existing rights of the prior and actual appropriator. On the other hand, whenever the waters of a stream, flowing wholly over the public land, have not been appropriated at all for any purpose, or whenever they have been appropriated for a purpose not recognized and protected by the congressional legislation, and a patent is issued by the United States to a private person conveying a tract of land on the banks of the same stream, in either case the patentee obtains, as incidents of his title, the full and complete rights of a private riparian proprietor on the stream. His title to the extent of his right as riparian proprietor is paramount to any subsequent appropriation from the stream as a public stream; and his rights in the stream are as perfect and complete when he is the sole private proprietor on its banks as when all the lands on its banks are held by private owners.

§ 121. Legitimate riparian uses.

Assuming, as has been shown, that the "riparian rights" of private "riparian proprietors" on natural running streams in this state of California are expressly excepted from the operation of the title concerning water-rights in the Civil Code, are wholly untouched by its provisions, and are left existing in every respect as though it had not been enacted, we are now in a position to ascertain, with more certainty and definiteness,

¹Rev. St. U. S. § 2338.

the nature and extent of these rights, and what uses of the waters they confer upon or withhold from the "riparian proprietor."

§ 122. California decisions.

The series of decisions heretofore cited show most conclusively that all of the fundamental common-law doctrines concerning the riparian rights of private riparian proprietors, which were so fully and ably expounded in the Nevada case, have been adopted by the California court, and recognized as forming a part of the California law. While the reasons for these doctrines have not been explained at such length in the California cases, and while the authorities upon which they rest have not been so exhaustively quoted, yet, upon a comparison of the various decisions, it will appear, beyond a possibility of a doubt, that all of the essential and important doctrines of the common law, as discussed and formulated by the Nevada court in the case of *Van Sickle v. Haines*, have been accepted and affirmed by the supreme court of California in repeated decisions. To present this conclusion in the clearest light, I give, even at the expense of repeating what has already been said, a brief summary of those decisions.

§ 123. Natural uses.

It is held that the right of the private riparian proprietor is an incident of his ownership of land on the bank of the stream, and exists as a necessary consequence of such ownership, and does not in the slightest depend upon the fact of an actual appropriation of the water having been made by himself or by any other riparian proprietor on the same stream.¹ The right to the water is not an absolute property in all the water, authorizing

¹*Pope v. Kinman*, 54 Cal. 3; *Creighton v. Evans*, 53 Cal. 55; *Ferrea v. Knipe*, 28 Cal. 341.

any riparian proprietor to consume it entirely; it is a right that the stream should continue to flow along in its natural channel as it has been accustomed to flow, and give the riparian proprietor the *usufruct* of the water as it passes along his land bordering on the stream; and this right belongs equally to all the private proprietors on the banks of the same stream, subject only to the advantage which position gives to those higher up the stream over proprietors lower down.¹ The law recognizes certain *natural* uses which are paramount to all others, and these include the use of water for household and domestic purposes, washing, drinking, cooking, etc., and its uses for watering stock. It may be doubted whether these "natural uses" embrace anything more than these two purposes. From these paramount *natural* uses originates the *only* advantage which the common law gives to one riparian proprietor over another or others on account of his relatively superior position. A proprietor higher up on the stream may use as much of the water as is reasonably necessary for his own domestic and household purposes, and for the watering of his own stock, even though the amount left flowing down the stream is thereby so much diminished that there is not enough left to supply the needs of the lower proprietor or proprietors for the same purposes. But the use for these purposes by a proprietor higher up the stream must be reasonable in amount, and reasonable in its methods and instrumentalities.²

§ 124. Secondary uses.

In addition to these natural and paramount uses, which necessarily consume the portion of water used, each riparian proprietor, by virtue of his *usufruct*, may use the water of the stream,

¹Id.

543; Stein v. Burden, 29 Ala. 127;

²Id. See Ferrea v. Knipe, *supra*.
And see Slack v. Marsh, 11 Phila.

Shook v. Colohan, 12 Or. 239, s. c.
6 Pac. Rep. 503.

as it passes along by or through his land, for any other lawful purpose, provided he returns all of the water, undiminished in amount and undeteriorated in quality, into the natural channel of the stream before it leaves his own land and enters upon that of the adjacent proprietor below him, and provided, also, he does not thereby interfere with the similar and equal right of the proprietor upon the immediately opposite bank of the stream, where his own land abuts upon only one bank,—that is, when the stream does not flow through his own land. In this manner any riparian owner may use the water of a stream for propelling machinery on his own land, provided he returns all the water into the natural channel before it leaves his own land, and does not impair its quality; and to this end he may construct a dam in the stream upon his own land, provided he does not interfere with the land of proprietors above him by the backwater, and does not invade the rights of a proprietor immediately opposite to himself on the other bank of the stream. These rights are conferred by the common law upon all of the proprietors owning lands upon the same stream. Any proprietor may, of course, obtain more extensive rights by grant from others, or by prescription. How far the right of the riparian proprietor includes the right to use and consume the water for purposes of irrigation, remains to be considered.

§ 125. Reasonable riparian use.

[The rule that every riparian proprietor has an equal right to the use of the water as it is accustomed to flow, without diminution or alteration, is subject to a well-recognized limitation, viz., that each owner may make a reasonable use of the water for domestic, agricultural, and manufacturing purposes.¹ But here

¹ Embrey v. Owen, 6 Exch. 352; 4 Mason, 397; Union Mill Co. v. Nuttall v. Bracewell, L. R. 2 Exch. Ferris, 2 Sawy. 176; Gerrish v. 1; Miner v. Gilmour, 12 Moore, P. New Market Manuf'g Co., 30 N. H. C. 131, 156; Tyler v. Wilkinson, 478; Tillotson v. Smith, 32 N. H.

it is necessary to note an important distinction between primary and secondary, or natural and artificial, wants; for, to supply his *natural* wants, as for household purposes, for quenching thirst, and for his cattle, a riparian proprietor may consume the entire stream if necessary; but for *artificial* wants, as for irrigating his land or propelling his machinery, he is only entitled to a reasonable use.¹

90; Norway Plains Co. v. Bradley, 52 N. H. 86; Holden v. Lake Co., 53 N. H. 552; Snow v. Parsons, 28 Vt. 459; Barrett v. Parsons, 10 Cush. 367; Elliot v. Fitchburg R. R., Id. 191; Cary v. Daniels, 8 Metc. 466; Pitts v. Lancaster Mills, 13 Metc. 156; Thurber v. Martin, 2 Gray, 394; Tourtellot v. Phelps, 4 Gray, 370; Chandler v. Howland, 7 Gray, 348; Wood v. Edes, 2 Allen, 578; Twiss v. Baldwin, 9 Conn. 291; Wadsworth v. Tillotson, 15 Conn. 366; Agawam Canal Co. v. Edwards, 36 Conn. 476; Merritt v. Brinkerhoff, 17 Johns. 306; Clinton v. Myers, 46 N. Y. 511; Acquackanonk Water Co. v. Watson, 29 N. J. Eq. 366; Farrell v. Richards, 30 N. J. Eq. 511; Williamson v. Canal Co., 78 N. C. 156; McElroy v. Goble, 6 Ohio St. 187; State v. Pottmeyer, 33 Ind. 402; Evans v. Merriweather, 3 Scam. 492; Plumleigh v. Dawson, 1 Gilman, 544; Batavia Manuf'g Co. v. Newton Wagon Co., 91 Ill. 230; Dumont v. Kellogg, 29 Mich. 420; Hazeltine v. Case, 46 Wis. 391, s. c. 1 N. W. Rep. 66; Swift v. Goodrich, 11 Pac. Rep. 561; 3 Kent, Comm. *440; Ang. Water-Courses, § 95; Washb. Easem. *216; Gould, Waters, § 205.

In 2 Washb. Real Prop. (4th Ed.) 348, it is said: "There are sundry uses which each successive owner along the stream may exercise,

though by so doing he impairs to some extent the enjoyment by others of the full flow of the water, provided it be done in a reasonable manner, and not so as thereby to destroy or materially diminish the supply of the water, or render useless its application by the other riparian proprietors, either by the quantity consumed or by corrupting its quality, by throwing it back upon the lands of others above, or diverting and stopping its flow so as to affect such lands below his own premises. Each case must depend upon its own circumstances; but among the uses to which a riparian proprietor may be said to have a natural right to apply the waters of a stream, to the extent already indicated, are such agricultural and domestic purposes as irrigating his land, watering his cattle, and the like;" citing Mason v. Hill, 5 Barn. & Adol. 1; Wood v. Waud, 3 Exch. 748, 775; Embrey v. Owen, 6 Exch. 353; Webb v. Portland Co., 3 Sum. 189; Sampson v. Hoddinott, 1 C. B. (N. S.) 590.

¹ Evans v. Merriweather, 3 Scam. 492; Stein v. Burden, 29 Ala. 127; Slack v. Marsh, 11 Phila. 543; Baker v. Brown, 55 Tex. 377; Rhodes v. Whitehead, 27 Tex. 314; Fleming v. Davis, 37 Tex. 173.

The question, *what is a reasonable use?* depends upon a number of circumstances; upon the subject-matter of the use itself, the size of the stream, the velocity of the current, the nature of the banks, the character of the soil, and a variety of other facts.¹ "What constitutes reasonable use," says the court in Wisconsin, "depends upon the circumstances of each particular case; and no positive rule of law can be laid down to define and regulate such use with entire precision, is the language of all the authorities upon the subject. In determining this question, regard must be had to the subject-matter of the use, the occasion and manner of its application, its object, extent, and the necessity for it, to the previous usage, and to the nature and condition of the improvements upon the stream; and so, also, the size of the stream, the fall of water, its volume, velocity, and prospective rise and fall, are important elements to be considered."² And the question of the reasonableness of the use of a stream, when it is not settled by custom and is in its nature doubtful, should always be regarded as one of fact, to be determined by the tribunal trying the facts.³ We may add that the mode and extent to which a riparian owner may use and apply the waters of a stream, as between him and another riparian proprietor, is not measured by what would be reasonably requisite for his particular business, but what is reasonable, having reference to the rights of the other proprietors in the stream, without, by such use, materially diminishing its quantity or deteriorating its quality.⁴ And even where a party has a right to the use of a water-course according to his convenience and judgment, and all the

¹Union Mills Co. v. Ferris, 2 Sawy. 176; Dilling v. Murray, 6 Ind. 324; Mayor of Baltimore v. Appold, 42 Md. 442; Elliot v. Fitchburg R. R., 10 Cush. 191; Thurber v. Martin, 2 Gray, 394; Timm v. Bear, 29 Wis. 254.

²Timm v. Bear, 29 Wis. 254.

³Snow v. Parsons, 28 Vt. 459.

⁴Batavia Manuf'g Co. v. Newton Wagon Co., 91 Ill. 246; Union Mill & M. Co. v. Ferris, 2 Sawy. 196; Wheatley v. Chrisman, 24 Pa. St. 298; Pennsylvania R. R. v. Miller, 112 Pa. St. 34, s. c. 3 Atl. Rep. 780.

right which prescription can confer, still he can exercise that right only in a reasonable manner; and therefore if he uses the water not for his own benefit and convenience, but maliciously or wantonly, to the prejudice of another, he is liable in damages.¹ Finally, it is only between riparian proprietors that the question as to the reasonable use of the water can ever arise.²]

§ 126. Reasonable use for manufactures.

[In regard to the use of the water for mechanical or manufacturing purposes, the rule is thus stated: "Each proprietor of land through which a natural water-course flows has a right, as owner of such land, and as inseparably connected with and incident to it, to the natural flow of the stream, for any hydraulic purpose to which he may think fit to apply it; and it is a necessary consequence from this principle that such proprietor cannot be held responsible for any injurious consequences which result to others, if the water is used in a reasonable manner, and the quantity used is limited by, and does not exceed, what is reasonably and necessarily required for the operation and propulsion of works of such character and magnitude as are adapted and appropriate to the size and capacity of the stream, and the quantity of water usually flowing therein."³ But as a riparian owner cannot, by prior appropriation, acquire the right to divert the water-course as against a lower proprietor, so he cannot by such priority acquire a right to consume the entire stream

¹Twiss v. Baldwin, 9 Conn. 291.

²Lux v. Haggin, (Cal.) 4 Pac. Rep. 925.

³Springfield v. Harris, 4 Allen, 494, Merrick, J. And see Davis v. Getchell, 50 Me. 602. But the diversion of a water-course, or a part of it, by an upper riparian propri-

etor, for manufacturing purposes, without restoring to the channel the excess of water not actually consumed, is an unreasonable exercise of the right to use the water of the stream. Weiss v. Oregon Iron & Steel Co., 13 Or. 496, s. c. 11 Pac. Rep. 255.

for mechanical purposes, as by converting it into steam.¹ The question whether the use of a stream to carry off manufacturer's waste is reasonable or not, is one of fact for the jury, depending upon the circumstances of the case, such as the size and character of the stream, the purpose of its use, the benefit to the manufacturer, and the injury to the other riparian owners.²]

§ 127. Manner of use must be reasonable.

[The maxim, *sic utere tuo ut alienum non ledas*, emphatically applies to riparian proprietors.³ For example, a riparian proprietor, in using the water of a stream for domestic purposes and watering cattle, has no right to so dam it up as to spread it over a large surface, whereby it becomes lost by evaporation and absorption to an extent to prevent the stream from flowing through the land of the next proprietor, as it would do but for such dam.⁴ But a riparian owner may dam the stream in order to make a pond for ice, and he may drain such pond, and hold back the water until he shall have cleaned out the pond in order that the ice may be pure. Those below cannot complain of such use.⁵]

¹Bliss v. Kennedy, 43 Ill. 67. In Garwood v. Railroad, 83 N. Y. 400, plaintiff was the owner of a mill operated by water-power furnished by a creek. Defendant, (a railroad corporation,) who was a riparian owner above, under a claim of right, diverted the waters of the creek, conveying them by pipes to reservoirs, whence its locomotives were supplied with water. The jury found, on sufficient evidence, that the water so diverted from the creek was sufficient

"to perceptibly reduce the volume of water therein," and to "materially reduce or diminish the grinding power of plaintiff's mill," and that in consequence he had sustained damage to a substantial amount. Held, that plaintiff might recover the damages sustained, and have the diversion enjoined.

²Hayes v. Waldron, 44 N. H. 580.

³Burwell v. Hobson, 12 Grat. 322.

⁴Ferrea v. Knipe, 28 Cal. 340.

⁵De Baun v. Bean, 29 Hun, 236.

CHAPTER VIII.

USE OF WATERS FOR IRRIGATION.

- § 128. Irrigation of riparian lands—Ellis v. Tone.
- 129. Limited authority of foregoing decision.
- 130. Tendency of decision in Ellis v. Tone.
- 131. The question as to irrigation stated.
- 132. No right to irrigate non-riparian lands.
- 133. Prior appropriation gives no exclusive right.
- 134. Relative equality of riparian owners.
- 135. Size of stream.
- 136. Reasonable use for irrigation.
- 137. Easements and adverse user.
- 138. Relation of irrigation to the natural wants.
- 139. Summary of principles.
- 140. Irrigation—The English authorities.
- 141. French law.
- 142. Review of the American authorities.
- 143. Review of authorities continued—The Pacific cases.
- 144. Surplus water must be restored.

§ 128. Irrigation of riparian lands—Ellis v. Tone.

We are now brought to the question, how far do the riparian rights of a private riparian proprietor, under the law of California and of Nevada, include the right to use the water of the stream for the purpose of irrigating his land? The only recent decision which deals directly with this question to any extent, or in any manner, is found in the case of *Ellis v. Tone*,¹ decided in 1881. Unfortunately this case is so reported that it does not throw much light upon the general question. The action was tried before a jury, but the report does not give the entire charge of the court, so that it may be seen upon what general theory of the law, or upon what admitted doctrine, the cause was tried and the recovery had. Certain detached clauses of the charge were

¹58 Cal. 289.

excepted to, and certain special instructions were refused, and these alone have been given by the reporter.

The opinion of the court is also confined to an examination of the specific exceptions, and does not enter into any discussion of the general doctrines upon which the case, as a whole, must have rested. The case, however, is the most recent published decision which deals with the right to use water for purposes of irrigation, and we shall state it in substance, by way of introduction to the discussion of this most important question.

The action was brought to recover from defendants damages for diverting water from Mormon slough, a natural water-course, by which plaintiffs were prevented from irrigating their growing crops in 1877. A verdict was rendered in favor of the plaintiffs. Defendants moved for a new trial, which was denied, and they appealed. The facts, as stated in the report, were as follows: Mormon slough or channel heads from and runs out of the Calaveras river east of Stockton, and about four miles northeasterly from plaintiffs' land, and flows thence in a south-westerly direction to the Stockton channel, a distance of about twenty miles. The slough runs through the land of the plaintiffs in two channels. The defendants own land on the Calaveras river, below the point where the Mormon slough runs out of that river. The slough is a natural water-course, having a well-defined channel and banks. In 1850, before the channel of the Calaveras river was filled in by mining *débris*, it (the lower channel of said river) was from four to six feet lower than the bed of the slough, so that the waters of the river did not flow into the slough until the waters of the river had risen from four to six feet. But the channel of the river has since been so filled up by *débris* that, when the water is low, most or nearly all of it runs and has run into and through the slough. That has been the case since 1862, unless prevented by artificial means, so that in dry seasons, or

in the dry season of the year, nearly all of the water ran into the slough; and during the whole of the year water was in the slough, while in the dry season little or none ran in the river below the head of the slough. In the fall of 1876 and winter of 1877 plaintiffs put in a crop of wheat and barley on their land, through which the slough ran as above stated. The plaintiffs made arrangements to irrigate this land in the next spring (of 1877) by damming the north channel of the slough, so as to make the water flow into the south channel, on the banks of which their crop was growing. This arrangement was completed in April, 1877. They then found that defendants had stopped the entrance of the slough by digging a ditch in the bed of the river, and by damming the exit of the slough from the river, so that the water was compelled to flow down the river, instead of flowing, as had been the case for fifteen years, into the slough. In consequence of this the water was cut off from the slough, the plaintiffs were unable to irrigate, and their crop was a failure. Evidence also showed that in the spring of 1877 the defendants had purchased from the Mokelumne Canal Company four hundred miner's inches of water, to be furnished between April 15th and the first of June. This water was taken from the Mokelumne river, and was turned into the Calaveras river at a point above the head of the Mormon slough, and flowed down that river to the lands of the defendants, so that they could use it for purposes of irrigation.

The court held that there was evidence sufficient to sustain the verdict for the plaintiff. The trial court charged the jury as follows: "This is an action brought by the plaintiffs against these defendants, wherein the plaintiffs allege themselves to be the owners of certain lands described in their complaint, and allege that the Mormon slough was a natural stream of water flowing through their lands. If you believe from the evidence that the Mormon slough was a natural stream of water, and that the

water would have flowed through their lands but for the diversion of the natural flow of that water by the defendants, the plaintiffs are entitled to a verdict for whatever damages they may have sustained to their crops, provided they were prepared to use the water, and had made the necessary preparations as they have alleged in their complaint. The measure of damages in this case is the amount of injury to the crops described in the complaint by the act of the defendants in diverting the natural flow of the water, if they did divert it. If, however, the plaintiffs received no damage by any act of the defendants, or they did not divert the natural waters of this stream to the injury of the plaintiffs, then your verdict will be for the defendants." To this paragraph the defendants excepted; and objected on the appeal that it assumed the fact of diversion; that it in effect directed the jury to find a verdict for damages to plaintiffs' crops, no matter from what cause the damages originated; and that it did not give the correct rule of damages. The supreme court held that these objections were without any foundation; that the instruction did leave the question to the jury whether defendants had or had not diverted the water; and that the trial court was not bound of his own motion to state any rule of damage to the jury, but the defendants must request him to lay down such rule as they claimed to be the true one, and, if he refused, then they could except to his refusal.

The defendants requested the trial court to give the following instruction, which the judge refused to give: "A riparian proprietor, who takes water from a channel in which it naturally flows, has no legal right to take it beyond his own land before returning it to its natural channel. So, if the jury believe from the evidence that the natural waters of the Calaveras river and Mormon channel would have flowed in the main Mormon channel (*i. e.*, the north channel which plaintiffs dammed up) after plaintiffs had built their dams, unless diverted by said dams or

other means; and if the jury further believe from the evidence that plaintiffs' dam in the main channel (*i. e.*, the north channel) of Mormon slough was not built on their own land for purposes of irrigation, but on the land of one Murphy, whose lands did not adjoin the land of plaintiffs; and unless the jury believe from the evidence that the proprietors of intermediate lands consented to the diversion of said natural water from the main (north) channel of the Mormon slough, by a dam placed therein by plaintiffs, (and such consent should be shown by the evidence,)—then the jury should find for the defendants." The defendants having excepted to the trial judge's refusal to give this instruction, claimed on the appeal that this refusal was error. The supreme court say: "It is urged that in this there was error, because plaintiffs did not show the consent of the intermediate owners of land referred to in the request. As to this, it is only necessary to say that no intermediate land-owner is here objecting to plaintiffs' bringing the water through their lands. As they made no objection, we cannot see that the defendants could make the objection for them, or either of them. No objection appearing, it is proper to conclude that no one of such owners ever objected."

The defendants also requested the trial court to instruct the jury as follows: "The plaintiffs are not in any event entitled to recover damages for the diverting from Mormon channel any waters which were not the natural waters of the Calaveras river, nor for the diverting of any waters in excess of plaintiffs' just and fair proportion of the natural waters of the Calaveras river and Mormon slough. If the jury believe from the evidence that the defendants caused to be turned in and run down the Calaveras river, above Mormon slough, prior to the erection of plaintiffs' dam, and until the first of June, 1877, waters taken from the Mokelumne river; and if the jury further believe from the evidence that the natural waters of the Calaveras river did not

run down the river to the head of Mormon slough in sufficient quantity to irrigate plaintiffs' land in the spring of 1877, and after plaintiffs had constructed their dams,—then the jury should find for the defendants." The court refused to give these instructions, and the defendants excepted. In regard to these exceptions the supreme court said: "The court did, in effect, charge all these propositions in giving the following requests asked by defendants: '*Third.* In no event were the plaintiffs entitled to the use as riparian proprietors of any water except the water which would naturally flow down the Calaveras river and the Mormon slough; and if the jury believe from the evidence that any water was turned into the Calaveras river above the head of the Mormon slough, at the request of the defendants, or any of them, from ditches which drew their water from Mokelumne river, then the plaintiffs cannot recover any damages for being deprived of the use of the water which was so turned into the Calaveras river. *Fourth.* The plaintiffs had not the legal right to use for the purpose of irrigation all of the natural waters of the Calaveras river which flowed down the Calaveras river and Mormon slough. The other riparian proprietors of land on the Mormon slough had a legal right to use such natural waters equally with plaintiffs. The plaintiffs had no legal exclusive right to use such natural waters for the purpose of irrigation in excess of their just and fair proportion thereof. *Ninth.* If the jury believe from the evidence that the defendants, or any of them, caused to be turned into the Calaveras river, above the head of Mormon slough, waters taken from the Mokelumne river, and such waters continued to flow down the Calaveras river from the middle of April until the first of June, 1877, then the plaintiffs cannot recover because the defendants prevented them from using such waters.'"

With respect to other exceptions and objections by the defendants, the supreme court further said: "An exception was re-

served to the following instruction asked by the plaintiffs: 'Every riparian owner upon a stream has a right to use, in a reasonable way, the water of said stream for domestic purposes, for the irrigation of his land, or for propelling machinery, if the quantity of water will warrant such use above the amount required for domestic purposes.' As to this, the counsel for defendants said: 'The plaintiffs were entitled to the reasonable use of the natural waters of the Mormon slough. By reasonable use is meant reasonable *quantity* as well as reasonableness in the *manner* of its use. The vice of the instruction is that the right to use the water is qualified by the reasonable *manner* of its use, and not by an unreasonableness in respect to the *quantity* used.' In our judgment, the criticism of the learned counsel is not warranted. It savors of hypercriticism. The instruction as given embraced *quantity* as well as *manner*. We do not see that any injury was done to the defendants in giving the instruction *eight*, asked by the plaintiffs. It was in these words: 'In the state of California the right to the use of water becomes fixed after five years' adverse enjoyment of the same.' There was some evidence, in our view, on which such a charge might be predicated. Further, in our opinion, the plaintiffs were entitled to recover if there was a diversion, which seems to have been clearly shown. In fact, the diversion was not denied in the answer, so that the charge objected to was immaterial, and did no injury."

We have thus quoted in full every instruction of the trial court, and every portion of the opinion of the supreme court in this case, which directly or indirectly relates to the riparian rights of riparian owners, or to unlawful diversion of water, or to the general question concerning the right to use the water for purposes of irrigation. All the other instructions as reported, and all the remaining portions of the opinion, deal exclusively with the measure of damages in this particular case, how far the plaintiffs were entitled to recover for the value of the crops which

they would have raised if their land had been irrigated, and by what evidence that value could be established. In this discussion no allusion whatever is made to riparian rights in general, nor to the general right of a riparian proprietor to use the water of the stream for the purpose of irrigating his land.

§ 129. Limited authority of foregoing decision.

It is very plain, from the foregoing description and quotations, that the general questions concerning the extent of private riparian rights, and especially concerning the right to use the waters of the stream for irrigation, are not determined by this case, except so far as a doctrine may be regarded as settled when it is tacitly accepted by both the litigant parties at a trial, and its correctness, therefore, is not questioned before or by the appellate court. The instructions of the trial court, purporting to embody the general rules as to the use of water for irrigation by a private riparian proprietor, were not excepted to by the defendants, and the rules thus laid down were therefore assumed to be correct *for this case* by the supreme court on appeal; but such assumption does not *necessarily* establish these rules as correct for all cases,—does not settle them as general rules of the law defining and fixing the rights which belong to private riparian proprietorship. There are other features of this case, as reported, which prevent it from being a final settlement of the important general questions under discussion. In the first place, it does not clearly appear in what relations the two litigant parties, plaintiffs and defendants, were regarded by the court as standing towards each other,—whether they were both regarded as two riparian proprietors upon the same stream, and, therefore, as having equal rights to the use of its waters; or whether the plaintiffs were regarded as riparian proprietors upon one stream, viz., the Mormon slough, and the defendants as appropriating and diverting the water of that stream for the bene-

fit of their land, which was not situated upon its banks. The Calaveras river and the Mormon slough might be regarded as one stream, although divided into two branches, in which case the plaintiffs might be in the position of upper, and the defendants of lower, proprietors on the single stream. The instructions of the trial court seem to have taken this view. On the other hand, the Mormon slough might be regarded as a single stream, and the plaintiffs as riparian proprietors upon it, while the defendants were *wrongfully* diverting and appropriating its waters, because they were not proprietors of land upon its banks. The language of the opinion of the supreme court, already quoted,—“further, in our opinion, the plaintiffs were entitled to recover if there was a diversion,”—tends somewhat to sustain this view as the one taken by that court.

In the second place, the two instructions of the trial court, which purported to embody the general rules concerning the use of water for irrigation, and which were not substantially objected to by the defendants, will be found, on careful examination, not to be entirely harmonious; in fact, they are susceptible of such a construction as will make them directly conflicting. In one of these instructions the trial court said: “The plaintiff had not the legal right to use, for the purpose of irrigation, all of the natural waters of the Calaveras river which flowed down the Calaveras river and the Mormon slough. The other riparian proprietors of land on the Mormon slough had a legal right to use such natural waters equally with the plaintiffs. The plaintiffs had no legal exclusive right to use such natural waters for the purpose of irrigation in excess of their just and fair proportion thereof.” It will be noticed here, in confirmation of what we have already said, that the court does not say “the other riparian proprietors of land on the Mormon slough, *and on the Calaveras river*, had a legal right to use the waters equally with the plaintiffs.” It thus fails to show clearly whether the plain-

tiffs and the defendants were regarded as riparian proprietors on the same stream. But, passing by this criticism, the instruction furnishes a plain, definite rule. It places the rights of all riparian proprietors to use the stream for irrigation upon a perfect equality. No proprietor has any advantage or superior right to use the water for such purpose, by reason of his being located higher up on the stream than others. This rule clearly and unequivocally distinguishes between the use of water for irrigation, and its use for so-called *natural* purposes, viz., domestic purposes and watering of stock. By this rule the right of every riparian proprietor to use the water for irrigation is limited, regulated, and controlled by the *equal* right of every other proprietor on the same stream to use its waters for similar purposes.

It will be remembered that the common-law doctrines distinguish between certain uses of water called *natural* and all others. It is the settled rule that, while a riparian proprietor must use the water in a reasonable manner and to a reasonable amount, he is entitled to take all of the water which is reasonably necessary in manner and amount to supply his *natural* purposes, namely, his domestic purposes and the watering of his stock, even if so much of the water of the stream is thus consumed that there is not a sufficient amount left flowing in its channel to supply the similar uses of the proprietors below him. In this single respect the common law gives a natural superiority of right to a proprietor higher up the stream over one lower down; but the superiority is strictly confined to the natural uses of domestic purposes and watering stock.¹ The real question to be determined is whether the irrigation of lands is one of these natural uses, standing upon the same footing with domestic uses and the watering of stock. The instruction quoted

¹ See *Ferrea v. Knipe*, 28 Cal. 341 344, per Currey, J.

above most unequivocally answers this question in the negative, and gives one proprietor no preference whatsoever over the other proprietors in the use of the stream for the purpose of irrigation. The second instruction, to which we have referred, seems to put irrigation on the same footing with domestic purposes. This instruction was as follows: "Every riparian owner upon a stream has a right to use, in a reasonable way, the water of said stream for domestic purposes, for the irrigation of his land, or for propelling machinery, if the quantity of water will warrant such use above the amount required for domestic purposes." So far as this instruction can be construed as laying down any rule, it plainly seems to place irrigation and domestic purposes upon the same footing, and, if so, it is conflicting with the doctrine announced in the other instruction previously quoted. We have thus analyzed these instructions, and the rules which they purport to embody, for the purpose of showing that, although tacitly adopted by the supreme court, because not objected to on the trial, they do not furnish any authoritative and final settlement of the questions at issue. The instruction last above quoted is open to the gravest criticism; it mingles up subjects entirely unlike. The use of water for "domestic" purposes necessarily *consumes* it. And yet, if the manner and amount are reasonable, the proprietor may use and thereby consume all that is reasonably necessary, under the circumstances, even though the natural flow of the stream is thus so diminished that there is not left a supply for the proprietors below. The use of water for irrigation also consumes it. It has been claimed that irrigation is a natural use, and that the right of a proprietor to use and consume water for irrigation is the same in nature and extent as the right to use and consume it for domestic purposes and for the watering of stock.

But, on the other hand, the use of water for propelling machinery does not consume it. The settled doctrines of the com-

mon law allow a riparian proprietor to use the water of a stream—the whole stream, if needed—as it passes through his land, for the purpose of propelling machinery, provided he returns the water, undiminished in quantity and undeteriorated in quality, into the natural channel of the stream before it leaves his own land and enters that of the proprietor next below him. Such a use for propelling machinery, under these limitations, cannot possibly injure the other riparian proprietors either above or below him on the same stream. There is therefore no analogy between the use of water for propelling machinery and its use for domestic purposes or for irrigation. These various uses are governed by entirely different rules, and depend upon entirely different considerations. Our review of this case does not touch upon the decision made by the supreme court. That tribunal could, of course, only deal with the questions presented to it by the record,—the questions raised by the exceptions.

§ 130. Tendency of decision in *Ellis v. Tone*.

Although this case of *Ellis v. Tone*, as we have shown by the foregoing examination, is of little value in *settling* the important, general doctrines as to the rights of private riparian proprietors in the law of California, yet it has a certain *tendency* towards such a settlement. It plainly distinguished between the case of a stream running wholly through public land, and that of a stream bordered by the lands of private owners. Although the cause of action arose in 1877, several years after the Civil Code took effect, no allusion whatever is made, by the court or the counsel, to the provisions of the Code relating to water-rights. The title of the Code on this subject seems to have been tacitly ignored as inapplicable to such a case. The arguments of the counsel for both parties, as reported, freely cite text-books and decisions based upon and representing the common-law doctrines, but they do not cite the Code. It is probable that the

case, as a whole, proceeded upon the assumption that the Calaveras river and the Mormon slough running out of it formed one stream in contemplation of law, and intended to deal with the rights of the two litigant parties as though both were riparian proprietors upon that single stream; in other words, it intended to lay down rules of law applicable to two proprietors in such a condition. In regard to the use of water for irrigation, the decision, as a whole, seems to deny the right of any riparian proprietor to use all the amount of water which may be reasonably necessary to irrigate his lands, if by such use the water left flowing down the stream is rendered insufficient for the similar purposes of other riparian proprietors. On the contrary, the case seems to regard the right to use the water of a stream for irrigation as belonging alike to all the riparian proprietors upon the stream; that each proprietor is entitled to use, for irrigating his lands, only so much of the water of the stream as is in excess over and above the amounts which are requisite to supply the similar purposes and uses of all the other proprietors upon the same stream. In fact, the right of each riparian proprietor upon any particular stream to use its water for irrigation must depend, among other things, upon the size of the stream, the amount and volume of water naturally flowing down its channel, the number of riparian proprietors upon it, the amount or acreage of the land entitled to irrigation held by each of these proprietors, and other similar considerations. Such, as it appears to us, is the *tendency* of the decision in *Ellis v. Tone*, although it cannot, in our opinion, be said that the case authoritatively and finally decides or settles any of these conclusions.

§ 131. The question as to irrigation stated.

We have thus thrown all the light of authority upon the particular but most important question, how far do the riparian rights of private riparian proprietors include the right to use the

water of the stream for the purpose of irrigating their riparian lands under the law of California and of Nevada? The previous discussions upon principle, as well as upon authority, have unmistakably led to the conclusion that this question has not yet been definitely and finally settled by judicial decision. All of the fundamental doctrines which were accepted by both parties in the recent case of *Ellis v. Tone*, and upon which that case was decided, as described in a former section, might be questioned or denied, and might possibly be rejected by a subsequent decision. Any answer which we shall attempt to give, must therefore, to a great extent, be merely speculative. It can only be an expression of our own individual opinion derived from a consideration of general principles, and from the tendency of previous adjudications. It cannot be regarded as a definite statement of the established and accepted rule of law. If we are correct, our opinion will, doubtless, be soon confirmed by the courts. If we are wrong, then our error must run through our whole course of reasoning covering the rights of *private* riparian proprietors, as distinguished from the rights to use public streams, and especially the interpretation which we had given to the provisions of the Civil Code, and some entirely different theory of private water-rights must be adopted by judicial authority. We shall proceed, however, to give in brief terms an answer to the general question formulated above,—an answer which, in our opinion, results directly, and as a necessary inference, from the doctrines which have been established by the unbroken series of decisions made by the supreme court of California, and quoted in our former chapters. Those decisions have been so frequently cited and so fully described, and the doctrines announced by them have been so elaborately discussed, that no more special reference need be made to them as authorities for our conclusions.

The question is, how far do the riparian rights of private ri-
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parian proprietors, by the law of California and of Nevada, include the right to use the waters of the stream for the purpose of irrigating their riparian lands? We shall assume, without restating or rearguing, the positions established in our previous articles,—namely, that the provisions of the Civil Code have no application to private riparian proprietors owning lands on the banks of a private stream, but the water-rights of such proprietors are left untouched and unaffected by the Code; and that the rights of such private riparian proprietors are those recognized, conferred, regulated, and protected by the common-law doctrines on the subject,—doctrines substantially the same as those so fully and carefully stated by the supreme court of Nevada in the case of *Van Sick v. Haines*.

§ 132. No right to irrigate non-riparian lands.

In the first place, a private riparian proprietor has no right whatever to divert or use any water of the stream for the purpose of irrigating lands which do not adjoin or abut upon the stream,—lands which are not strictly riparian. The appropriation and division of the waters of a natural stream, for the benefit of a tract of land not situated upon one or both of its banks, are wholly unknown to the common law. They are a part and parcel of the peculiar system which has grown up in the Pacific communities primarily and mainly from the local customs and needs of those engaged in mining; and they are confined entirely to the public streams,—to those streams flowing through the public lands of the United States,—or, under the Civil Code, of the state of California. The common-law doctrines restrict the use of waters of natural streams to the lands bordering on those streams, and the right to use the waters is held exclusively by the private owners of such lands in their character as riparian owners. There is nothing more completely antagonistic to the common-law system, nothing which would more com-

pletely destroy the equality and equity of the common distribution of rights among all the private riparian proprietors on any particular stream, than the appropriation and diversion of its waters, by means of ditches or canals, for the benefit of lands not adjoining the stream, by persons who are not, with respect to such lands, riparian proprietors. If a private riparian proprietor owns a tract of land actually bordering on the stream, he may possibly be entitled to use the water for the purpose of irrigating the entire tract, no matter how great may be its extent; how far distant from the stream may be its exterior line; but his right to use a quantity of the water sufficient for that purpose must depend upon other considerations to be mentioned hereafter. It is certain, however, that no person can take water from such a stream for the purpose of irrigating his tract of land which is separated from the stream by the intervening lands belonging to other and riparian proprietors.

§ 133. Prior appropriation gives no exclusive right.

In the second place, a prior appropriation can give no exclusive right to the use of the water for purposes of irrigation, and no superior right nor preference as to the quantity of the water consumed for such purposes. Whether a person was the very first one who acquired title to lands on the banks of a given stream, and as such sole owner first began to use its waters, or whether, after many riparian proprietors had acquired their respective titles, he was the first one of them to use its waters, in either case the prior appropriation can give no right to use an unlimited quantity, or an excess in quantity, nor any other relative superiority in the use of the water for irrigation, over all the other private riparian proprietors on the same stream. The doctrine of prior appropriation, as has been shown, is foreign to the common law. So far as recognized by the law of California and of Nevada, it is confined to public streams, and

arose from local customs and the peculiar needs of miners, although it was extended, in its application to public streams, to other businesses, occupations, and uses besides mining. The fundamental conception of the common-law system is the purely equitable principle of relative equality of right among all the private riparian proprietors upon the same stream. *Nature* gives to all the riparian proprietors on any stream an advantage, growing out of their location, over other owners whose lands do not adjoin a water-course; and this *natural right* cannot be taken away by the law, although its enjoyment may be interfered with or prevented by arbitrary legislation.

§ 134. Relative equality of riparian owners.

The common law recognizes this natural right of all the riparian proprietors on the same stream, resulting thus from their location, and distributes and regulates it among them all according to the equitable principle of relative equality. All have relatively the same rights to enjoy the benefits of the water as it flows by or through their lands, not depending upon the time when the use began, but upon the extent of their riparian lands,—upon the quantity of their lands susceptible of being lawfully benefited by the water. This notion of equality, as has been shown, runs through and shapes the entire system of common-law doctrines concerning the rights to the waters of natural streams. Any legislation which ignores or violates this equitable notion of equality is so far unjust. To this otherwise universal rule the common law, as has been shown, recognizes one partial exception. As the use of water for drinking, both by man and beast, and for other purely domestic and household purposes, is essential to the preservation of life, the common law gives a preference to its use for these so-called natural purposes. To this end a riparian proprietor is allowed to use all the water of a stream reasonably necessary for domestic purposes and water-

ing stock, even though the natural flow of the stream was thereby lessened, and the supply for the other proprietors lower down was diminished. This exception, however, was carefully restricted, and was never extended beyond its reasons. It does not and cannot include irrigation. To permit a proprietor higher up the stream, or a prior appropriator, to have an unrestricted use of water for purposes of irrigation, would be a gross invasion of natural rights, and a virtual destruction of the utility of streams to the entire community of riparian owners through which they flow. This is the view taken by the contending parties, and therefore adopted by the court for the purposes of that case, in *Ellis v. Tone*; but, as we have shown, it is not definitely settled by that decision.

§ 135. Size of stream.

In the third place, there is nothing in the common-law doctrines, as the supreme court of Nevada have stated in the case of *Van Sickle v. Haines*, which prohibits the use of water for irrigation by the private riparian proprietors on all streams, as a part of their general rights. The fundamental notion being that of relative equality of right among all the proprietors on the same stream, it is evident that, if the natural flow of the water is sufficient to allow each one of them to take an amount sufficient for the needs of his own tract of riparian land, without infringing upon the equal rights of the others, no injury could possibly result from such an appropriation and use. The only difficulty would arise where the natural flow of the stream was not large enough to furnish such a complete and unrestricted supply to every proprietor.

The common law permits each proprietor to use the water of a stream, as it flows by or through his own land, for any purpose, like the propelling of machinery, which does not consume it to any substantial extent. But a use which necessarily con-

sumes the water—like that for purposes of irrigation—lessens the natural flow of the stream, and therefore tends to invade the equal rights of other riparian proprietors. If, however, after any proprietor has used and consumed all the water which he reasonably needs for the irrigation of his own land, there is still left an amount flowing down the stream adequate for the similar needs of all the other riparian proprietors below him, the result of his act would at most be a *damnum absque injuria*. On the larger streams of the state, therefore, in which the natural flow of water is considerable and is constant throughout all seasons of the year, irrigation might be resorted to, it would seem, by the private riparian proprietors, without any practical violation of the common-law doctrines. On the minor streams, in which the natural flow of water is small and inconstant, varying with different seasons, the difficulty is much greater. In fact, it seems hardly possible for a proprietor upon such a small and varying stream to consume a quantity of the water sufficient for the irrigation of his own land, without thereby lessening the natural flow to such an extent as to invade the equal rights of the other proprietors.

§ 136. Reasonable use for irrigation.

Finally, it is very plain that the only right of a private riparian proprietor to appropriate the water of the stream for the purpose of irrigation, which is consistent with the common-law doctrines, is a right which belongs in relative equality to all the proprietors alike. The quantity of water which any proprietor may divert must depend, in the first place, upon the extent of his own land and the amount reasonably requisite for its irrigation; and, in the second place, upon the extent of the lands held by all the other riparian proprietors, and the amount reasonably requisite for their irrigation; and, in the third place, upon the size of the stream itself, and its capacity to furnish a supply for all

these proprietors. Or, to state the same position in other words, each riparian proprietor is only entitled to use, for the purpose of irrigating his own land, that portion of the stream which is in excess over the amount thereof to which all the other proprietors are equally entitled for the purpose of irrigating their own tracts of land. Any other rule than this must necessarily violate natural justice and equity. It is plain, however, that when the stream is small, where the flow of water is varying, where its amount is insufficient to furnish a constant and considerable excess over and above the needs of all the riparian proprietors, this common-law rule can only be a very imperfect and impracticable guide; it needs to be supplemented and aided by positive legislation. The character and object of such legislation we shall attempt to explain in the succeeding and final chapter.

§ 137. Easements and adverse user.

All the foregoing discussion concerning the rights of private riparian proprietors has assumed and treated their rights as they exist at the law, unaffected by agreement or other conduct among the proprietors themselves. It is hardly necessary to state that any private riparian proprietor upon a stream may obtain, as against other proprietors, special rights to use the water, in the nature of easements or servitudes, far other and greater than those which the law confers upon him simply as a riparian proprietor. Thus, for example, he may obtain, by grant from other proprietors, or by prescription against them, the exclusive right to any portion of the waters of a stream for purposes of irrigation; and thus a prior appropriation may by prescription ripen into a lawful right, as against all the other riparian proprietors, to use the entire waters of a stream for any beneficial purpose. It is not our design to enter into any discussion of the servitudes which may thus be acquired by grant or by prescription. The

law on this subject is in no manner peculiar to these Pacific communities, except in the remarkably short statutory period of adverse user—five years—adopted by the Code of California.

§ 138. Relation of irrigation to the natural wants.

[Water for irrigation is not a natural want in the same sense that water for quenching thirst is, which a riparian proprietor may satisfy without regard to the rights and needs of proprietors below. Thus a riparian owner may lawfully divert the water of a stream, for the purpose of irrigating his land, to a reasonable extent, but in no case may he do this so as to destroy, or render useless, or materially affect, the application of the water by other riparian proprietors.¹ Now, it follows from this principle, in the first place, that a riparian owner cannot divert *all* the water of a stream, for the purpose of irrigating his lands, without regard to the rights of other owners, even though the whole stream might be needed for the sufficient accomplishment of his purpose. This question was presented in the most direct and explicit manner in the recent case of *Learned v. Tange-man*.² The action was brought by a private riparian proprietor against another private riparian proprietor, having lands situated upon the banks of the same stream higher up than the lands of the plaintiff. The defendant had diverted the water of the stream for the purpose of irrigating his own riparian lands, and the plaintiff complained that he had diverted and used more than the amount to which he was entitled, and had thereby deprived the plaintiff of the portion of the waters of the stream to which *he* was entitled for the irrigation of his own riparian land. At the trial the judge instructed the jury that, "if they believed from the evidence that the defendant was a riparian proprietor, and used the water of the stream for the purpose of irrigating

¹Union Mill Co. v. Ferris, 2
Sawy. 176.

²65 Cal. 334, s. c. 4 Pac. Rep.
191.

his lands, *and used no more than was necessary for that purpose*, and returned the surplus water after such use into the channel, then they should return a verdict for the defendant." It is perfectly evident that this instruction of the trial court was given upon the assumption that the right of a riparian proprietor to use the water of a stream for the irrigation of his lands is identical and co-extensive with the natural right of a riparian proprietor to use the water for watering his cattle, for drinking, and for other strictly domestic purposes; that, in the one case as well as in the other, a riparian proprietor is entitled, by the law, to divert and consume all the amount of the stream which may be reasonably necessary for his purposes, even though a sufficient quantity is not left remaining to flow down the channel for similar needs of the riparian proprietors below him. If this assumption of the lower court had been correct, then the instruction to the jury, as given in this case, would undoubtedly have stated the rule of law applicable to the facts with substantial accuracy. But the decision of the supreme court shows, in the clearest and most positive manner, that the assumption was incorrect, and that the right to use water for irrigation is not identical or co-extensive with the right to use it for watering cattle and other like domestic purposes. The supreme court, after quoting the instruction to the jury as given above, proceed to condemn it in the following language: "This (instruction) was error, for by it the jury were in effect told that the defendant was entitled to divert and use *all* of the water of the stream, if necessary for the irrigation of his land, without regard to the wants or necessities of the other riparian proprietor." The judgment was therefore reversed, and a new trial of the cause was ordered.¹

¹ [The foregoing account of the case of *Learned v. Tangeman* is in the language of Professor Pomeroy, and is taken from an article

which appeared in the *West Coast Reporter* after the close of the series which forms the basis of the present work. ED.]

But, in the second place, we may go further than this, and lay down the rule that no one has a right to use the waters of a stream for irrigation to an extent materially impairing the right of another riparian proprietor to the reasonable use of the same for the purpose of supplying his natural wants and domestic necessities unless he has gained this right in some mode known to the law, as by grant or prescription. In other words, irrigation is *subordinate* to the natural wants. "The right to irrigate, when not indispensable, but used simply to increase the products of the soil, would be subordinate to the right of a co-proprietor to supply his natural wants, and those of his family, tenants, and stock; as to quench thirst, and to the right to use the water for necessary domestic purposes. Hence, whether the use of the water for purposes of irrigation is reasonable and lawful as against another would depend upon the facts of the particular case. If the stream should be sufficiently large to admit of necessary irrigation without unreasonably impairing the rights of other proprietors, then it would be reasonable and lawful; otherwise it would not."¹ Hence, when the stream is small, and does not furnish water more than is sufficient to supply the natural wants of the different proprietors living on it, *none* of the proprietors can use the water for irrigation.² It is in this light that we must understand the language of the supreme court of Pennsylvania, where it is said: "Whenever so much of the volume of water is obstructed as to be plainly perceptible in its practical uses below,—whenever the channels,

¹Baker v. Brown, 55 Tex. 377. In Rhodes v. Whitehead, 27 Tex. 304, it was said: "It may be admitted that the purpose of irrigation is one of the natural uses, such as thirst of people and cattle, and household purposes, which must absolutely be supplied. The appropriation of the water for this

purpose would therefore afford no ground of complaint by the lower proprietors if it were entirely consumed." But this decision was practically overruled by Baker v. Brown, *supra*.

²Evans v. Merriweather, 3 Scam. 492.

which before were filled, exhibit the loss of the accustomed fluid,—an injury is committed for which an action may be sustained, though it may not have been actually used by the lower proprietor.”¹]

§ 139. Summary of principles.

[It has thus been made to appear that there is no right to use the water for the irrigation of non-riparian lands; that a prior appropriation can give no exclusive right to the use of the waters for irrigation, and no superior right as to the quantity of water that may be consumed in that manner; that the equitable principle of relative equality must be preserved between all the riparian owners; that it is a part of the general riparian right to use the water for irrigation, if the size of the stream is such that no injury is thereby done to any other proprietor; that irrigation is not one of the natural wants, for which the whole stream may be consumed if necessary, but is subordinate to these uses. We have now to inquire whether, aside from the foregoing specific principles, there is any general rule of law, applicable to all cases alike, governing the riparian right of irrigation. As a result of all the authorities, it may be stated that the only rule which admits of general application is this: The use of water for irrigation must in all cases be *reasonable*, regard being had to the rights and needs of all the other proprietors on the same stream; and reasonableness is a question of fact, to be determined upon all the circumstances of the particular case. In order that this may appear more clearly, it will be necessary to review the decisions on this subject at some length.]

¹ Miller v. Miller, 9 Pa. St. 74.

§ 140. Irrigation—The English authorities.

[In regard to the right of a riparian proprietor to use the water of the stream for irrigation, the rule in England appears to be that he may do so, provided he restores the water to its channel in a volume substantially undiminished.¹ The most important of the cases dealing with this topic is that of *Embrey v. Owen*, in which Parke, B., observed: "On the one hand, it could not be permitted that the owner of a tract of many thousand acres of porous soil, abutting on one part of the stream, should irrigate them continually by canals and drains, and so cause a serious diminution of the quantity of water, though there was no other loss to the natural stream than that arising from the necessary absorption and evaporation of the water employed for that purpose. On the other hand, one's common sense would be shocked by supposing that a riparian owner could not dip a watering-pot into the stream in order to water his garden, or allow his family or his cattle to drink it. It is entirely a question of *degree*, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is often no difficulty in deciding whether a particular case falls within the permitted limits or not."²

The supreme court of California, however, has said that "*a priori* it would be expected that the decisions in Great Britain and Ireland would not much assist the inquiry, since, owing to the humidity of the climate of those islands, it must rarely happen that any use for irrigation can be *reasonable*; and for any purpose the use must be reasonable."³]

¹ *Embrey v. Owen*, 6 Exch. 352; 590; *Miner v. Gilmour*, 12 Moore, Swindon Water-Works v. Wilts P. C. 156; *Norbury v. Kitchin*, 9 Canal Co., L. R. 7 H. L. 697; *Earl of Sandwich v. Great Northern Ry.*, L. R. 10 Ch. 707, 711; *Sampson v. Hoddinott*, 1 C. B. (N. S.)

590; *Miner v. Gilmour*, 12 Moore, P. C. 156; *Norbury v. Kitchin*, 9 Jur. (N. S.) 132; 1 Add. Torts, § 89.

² *Embrey v. Owen*, 6 Exch. 352.

³ *Lux v. Haggin*, (Cal.) 10 Pac. Rep. 757.

§ 141. French law.

[It may here be remarked, by way of illustration, that, by the laws of France, every proprietor of land bordering on a running stream may use it for the purpose of irrigating his land, and, when his estate is intersected by such water, he may divert it for purposes of irrigation, on condition that he restore it at the boundary of his property to its ordinary channel. And, in all disputes respecting the right to take water from running streams, the courts are enjoined to reconcile as much as possible the interests of agriculture with the respect due to property and the rights of individuals.¹]

§ 142. Review of the American authorities.

[On examining the decisions in the eastern states, and the opinions of the text writers, we shall find, notwithstanding some diversity of language, the same thread of principle running through them all, viz., that the use must be reasonable, due regard being had to the equal rights of all the riparian owners. This will sufficiently appear from the following extracts. In an early Massachusetts case it is said: "A man owning a close on an ancient brook may lawfully use the water thereof for the purposes of husbandry, as watering his cattle, or irrigating the close; and he may do this either by dipping water from the brook, and pouring it upon his land, or by making small sluices for the same purpose; and, if the owner of a close below is damaged thereby, it is *damnum absque injuria*."²

Chancellor Kent is sometimes quoted as proving that water cannot be employed for irrigation, sometimes as proving that it may be. His language is as follows: "Streams of water are intended for the use and comfort of man, and it would be unrea-

¹Code Napoleon, liv. 2, Nos. 640-645. See 1 Add. Torts, § 89.

²Weston v. Alden, 8 Mass. 136.

sonable, and contrary to the general sense of mankind, to debar any riparian proprietor from the application of water for domestic, agricultural, or manufacturing purposes, provided the use of water be made under the limitation that he do no material injury to his neighbor below him, who has an equal right to the subsequent use of the same water.”¹ On this passage the supreme court of California makes the following pertinent observations: “It seems to us that the foregoing (although a very distinct statement of the general proposition) ought not to be taken literally, unless the words ‘material injury’ be impressed with a signification the equivalent of a substantial deprivation of capacity in a lower proprietor to employ the water for useful purposes. The adjective is prefixed to ‘injury,’ and the words seem to have reference to the enjoyment of the use by the inferior owner, not to his mere abstract right to the use as against others than riparian owners, and to intimate that he cannot complain of a reasonable exercise of the use by another who possesses the general right in common with himself. The passage, as a whole, may be fairly said to convey the idea that water may be used for agricultural or manufacturing purposes when such use does not materially deprive the lower proprietor of water, either for drinking or for agriculture.”²

In an early New York decision it is said: “The defendant has a right to use so much as is necessary for his family and his cattle, but he has no right to use it for irrigating his meadow, if thereby he deprives the plaintiff of the reasonable use of the water in its natural channel. The evidence shows that the defendant has appropriated the whole water to his own use, and he seems to suppose that he possesses that right.”³ Again, it is said that the riparian proprietor “may make a reasonable use

¹3 Kent, Comm. 429.

³Arnold v. Foot, 12 Wend. 330.

²Lux v. Haggin, 10 Pac. Rep. 756.

of the water itself, for domestic purposes, for watering cattle, or even for irrigation, provided it is not unreasonably detained or essentially diminished.”¹

Some of the earlier cases, it will be perceived, do not make a very clear distinction between the natural and artificial uses of the water, being even disposed to class irrigation among the former. But the later authorities announce the rule with more discrimination. Thus, in *Gillett v. Johnson*,² Butler, J., remarks: “The right of the defendant to use the stream for purposes of irrigation cannot be questioned. But it was a limited right, and one which could only be exercised with a reasonable regard to the right of the plaintiff to the use of the water. It was not enough that the defendant applied the water to a useful and proper purpose, and in a prudent and husband-like manner. She was also bound to apply it in such a reasonable manner and quantity as not to deprive the plaintiff of a sufficient supply for his cattle.” So in a New Jersey decision it is held that the right of every riparian owner to use the water flowing through his land for its proper irrigation is subject to the limitation that his use for that purpose must be such as not essentially to interfere with the natural flow of the stream, or essentially and to the material injury of the proprietors below to diminish the quantity of water that goes to them.³ And the court in Massachusetts has given a satisfactory discussion of the subject, from which we quote as follows: “What is a just and reasonable use may often be a difficult question, depending on various circumstances. To take a quantity of water from a large running stream for agricultural or manufacturing purposes would cause no sensible or practicable diminution of the benefit to the prejudice of a lower

¹ *Blanchard v. Baker*, 8 Me. 253, 266.

³ *Farrell v. Richards*, 30 N. J. Eq. 511.

² 30 Conn. 180.

proprietor; whereas, taking the same quantity from a small running brook, passing through many farms, would be of great and manifest injury to those below who need it for domestic supply or watering cattle; and therefore it would be an unreasonable use of the water, and an action would lie in the latter case, and not in the former. It is therefore, to a considerable extent, a question of degree; still the rule is the same: that each proprietor has a right to a reasonable use of it for his own benefit, for domestic use, and for manufacturing and agricultural purposes. It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation; but this, we think, is an abstract question, which cannot be answered either in the affirmative or negative, as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think is well established as one of the rights of the proprietors of the soil along or through which it passes; yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, *wholly* abstract or divert the water-course, or take such an unreasonable quantity of water, or make such an unreasonable use of it, as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably. The point may, perhaps, be best illustrated by extreme cases. One man, for instance, may take water from a perennial stream of moderate size, by means of buckets or a pump,—for the mode is not material,—to water his garden. Another may turn a similar current over a level tract of sandy soil of great extent, which in its ordinary operation will nearly or quite absorb the whole volume of the stream, although the relative positions of the land and stream are such that the surplus water, when there is any, is returned to the bed of the stream. The one might be regarded as a reasonable use, doing no perceptible damage to any lower proprietor, while

the other would nearly deprive him of the whole beneficial use, and yet in both the water would be used for irrigation.”¹]

§ 143. Review of authorities continued—The Pacific cases.

[When we come to examine the later decisions of the courts on the Pacific coast, we shall find no repudiation of the rule thus deduced from the common law. On the contrary, the same principle has been accepted as determinative, and has been applied and carried out to its legitimate conclusions; and this with so much certainty and emphasis that the question must be regarded as definitely settled in these states until legislation shall intervene. Thus, in a recent Nevada decision, Chief Justice Hawley remarks: “When it is said that such use must be made of the water as not to affect the material rights of other proprietors, it is not meant that there can be no diminution or decrease of the flow of water; for, if this should be the rule, then no one could have any valuable use of the water for irrigation, which must necessarily, in order to be beneficial, be so used as to absorb more or less of the water diverted for this purpose. The truth is that, under the principles of the common law in relation to riparian rights, if applicable to our circumstances and condition, there must be allowed to all, of that which is common, a reasonable use.”²

In the important case of *Lux v. Haggin*,³ decided by the supreme court of California in 1886, the rule is tersely laid down as follows: “By our law the riparian proprietors are en-

¹ *Elliot v. Fitchburg R. Co.*, 10 Cush. 193-195. See, further, *Anthony v. Lapham*, 5 Pick. 175; *Newhall v. Ireson*, 8 Cush. 595; *Evans v. Merriweather*, 3 Scam. 496; *Washb. Easem.* 234; *Gould, Waters*, § 217.

² *Jones v. Adams*, (Nev.) 6 Pac. Rep. 442. See, also, *Barnes v. Sabron*, 10 Nev. 217; *Swift v. Goodrich*, (Cal.) 11 Pac. Rep. 561.

³ 10 Pac. Rep. 755-764.

titled to a reasonable use of the waters of the stream for the purpose of irrigation. What is such reasonable use is a question of fact, and depends upon the circumstances appearing in each particular case." The court continued: "The question whether the use is reasonable is not so much whether the water below is diminished thereby, as whether the lower proprietor is materially *injured* by the diminution,—injured by not receiving the benefit in due proportion of the enjoyment to which he and the other proprietors are entitled. It is obvious that the use of water for the purpose of irrigation always involves some loss by evaporation and absorption, and must often result in a sensible and clearly perceptible reduction of the quantity in the channel. An entire diversion of a water-course by an upper riparian proprietor, (or a diversion of a part of it,) for irrigation, without restoring to the channel the excess of the water not actually consumed, is never allowed. Whether or not a *diversion* of water is reasonable, is a question not so much as mentioned by any writer or judge. The very proposition assumes the right of the proprietor above to use the water for his own purposes, to the *exclusion* of the proprietors below,—a proposition inconsistent with the doctrine universally admitted, that all proprietors have the same rights." In the same case, after an elaborate review of the authorities upon this question, the court sums up its conclusions as follows: "The reasonable usefulness of a quantity of water for irrigation is always relative. It does not depend on the convenience of or profitable results to the particular proprietor, but upon the reasonable use, reference being had to the needs of all the other proprietors on the stream. It depends, in other words, on all the circumstances. We anticipate the objection that this is not an absolute rule at all; but, as said by the judges in the opinions quoted from, the very nature of the common right is such that a precise rule as to what is reasonable use by any one proprietor

for irrigation cannot be laid down. A stream may be so small that any use for irrigation may deprive all the others of any like use; and the same may be true of a larger stream, where the use is by several of a large number of proprietors. The effect might be that, while there might be sufficient water to supply several for irrigation, there would not be enough for all, and so all might be deprived of the benefit. But the private interests of all would in most cases, if not in every case, lead to an avoidance of the supposed evil. It is not to be doubted that the riparian proprietors would settle by convention upon a plan by which each could secure a reasonable use for irrigation purposes; as by authorizing each to stay the flow at recurring periods, or otherwise distributing it for their mutual and common benefit. The right of the riparian proprietors to a reasonable use of the water of the stream for purposes of irrigation is recognized in many of the California cases hereinbefore referred to."¹]

§ 144. Surplus water must be restored.

[Where a riparian owner diverts the water of the stream for the purpose of irrigation, without returning the surplus into the natural channel, whereby the owner of land below, entitled to use the water in the same manner, is deprived of his privilege, an action lies.²]

¹Lux v. Haggin, (Cal.) 10 Pac. Rep. 763.

²Anthony v. Lapham, 5 Pick. 175; Cook v. Hull, 3 Pick. 269; Blanchard v. Baker, 8 Me. 253.

CHAPTER IX.

SUGGESTIONS FOR LEGISLATION ON RIPARIAN RIGHTS.

- § 145. Need of statutory regulation.
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§ 145. Need of statutory regulation.

In concluding our discussion upon water-rights in the Pacific communities, we purpose to offer a few observations or suggestions concerning the legislation which should be enacted in the states of California and Nevada for the more complete regulation and protection of these rights. We have already given a full synopsis of the statutory systems adopted in all the other states and territories of the Pacific coast embraced within our general review; and, as before stated, we shall enter into no discussion of these statutes. As those states and territories become more settled by an agricultural population, the practical effect of their legislative methods will become known, and some satisfactory judgment can be formed as to their efficacy. At present any discussion of them might be regarded as speculative, al-

though the results which they must inevitably produce are, in our opinion, perfectly clear. Confining ourselves, therefore, to the two states of California and Nevada, if we are correct in our conclusions concerning the rights of private riparian proprietors upon natural streams, and especially upon their right to use the waters thereof for purposes of irrigation, it is plain that some legislation is needed, not to define and establish the rights, but to protect and regulate their exercise within certain limits.

§ 146. Irrigation—Common-law rules inadequate.

Assuming as true, what we think has been shown to be established by judicial authority, that the general common-law doctrines on the subject apply to and determine the rights of private riparian proprietors, those doctrines are sufficient of themselves to regulate the use of water, by private riparian proprietors, for all other ordinary purposes except that of irrigation. The common-law rules concerning the use of water for milling and manufacturing purposes, and for all those purposes termed "natural,"—domestic and household consumption, and the watering of stock,—are simple, plain, equitable, and just. No fault has ever been found with their practical operation; they are suited to all communities and circumstances; no legislation is needed to render them effective; any legislation interfering with their free control would be injurious. With irrigation the case is otherwise. The use of the waters of natural streams for irrigation is, in many respects, the most important of all possible uses, in these states. Without irrigation the agricultural resources of the soil cannot be developed; with a sufficient supply of water for irrigation, there are hardly any accessible portions of these states which cannot be made profitably productive. The problem is, to benefit as large a portion of the agricultural population as possible, by affording the means of irrigating their lands, without invading and violating the private natural rights

of any class of proprietors. The use of water for purposes of irrigation is practically unknown to the common-law. While the equitable principles of the common law may, without any alteration, comprehend the use of water for purposes of irrigation, yet the special rules developed by common-law courts from those principles have not dealt with irrigation. In applying these established doctrines of the common law to the use of water for irrigation, the aid of statutory legislation is clearly needed. If the rights of the private riparian proprietors upon the same stream to use its water for irrigation were correctly stated in our last chapter, it is plain that some practical, simple, and comprehensive method is necessary to settle authoritatively the relative rights of all the proprietors upon any particular stream, and the relative amounts or proportionate quantities of its water which they are all entitled to take and consume. The general doctrine that each is only entitled to the excess over and above that which all the others are entitled to take, is simply the foundation. How that excess is to be actually ascertained and apportioned to each riparian proprietor *before he takes the water from the stream* is the difficulty; and it is a difficulty which can only be obviated by statutory legislation.

§ 147. Contents of proposed statute.

Adopting the equitable doctrines of the common law as its basis, the sole purpose of the legislation should be to furnish a practical mode by which these doctrines can be applied to the use of water for the irrigation of lands. To this end the provisions of the statute should not consist of vague generalities, merely defining some general rights, and leaving all the practical working and effects of the system to be settled by a long series of judicial decisions. They should be detailed, specific, and minute. The statute should be most carefully drawn so as to provide a plain, certain, inexpensive, and practical system regulating the

exercise by every riparian proprietor upon any stream of his right to use the waters thereof for purposes of irrigation; determining the relative amounts of the water to which all of the proprietors are entitled under every condition of circumstances; the proportionate amounts when the whole flow of the stream is not sufficient to furnish a full supply to all; the times and order in which the water may be taken; and all other similar matters. The statutory provisions should be so clear and definite that there could be no reasonable doubt as to the extent of each proprietor's right under any ordinary circumstances; and they should give a simple and effective means of enforcing these rights and regulating their exercise, through the interpretation of local agents or officials representing the whole body of riparian proprietors upon any particular stream, without the necessity of a resort to the courts, and to actions for damages or for injunctions, as the only means of protecting the rights or preventing their invasion.

§ 148. Essential nature of projected law.

Without dwelling any further upon its external form, we proceed at once to the most important inquiry, what should be the essential nature of this legislation? We submit, as its fundamental conception, that such legislation should recognize, be founded on, and carry out *natural laws and natural rights*. Any attempt to violate natural and economic laws and rights, to confer a supposed benefit upon certain classes of persons by legislation which invades and abrogates the *natural* rights, resulting from natural and economic laws, held by other persons, must be injurious to society as a whole, and can produce no real good to any portion of it. In the second place, the legislation should interfere as little as possible with existing and established private rights of property. Numerous private riparian proprietors are located upon nearly all the important streams in this state;

the lands upon the banks of some of these streams are probably all, or nearly all, held by private owners. The rights of all these proprietors are recognized and established by the existing law of the state as incident to or a part of their property. These rights should not be disregarded. An attempt to do so would be grossly unjust, and could only produce confusion and wrong. Finally, it is a principle of universal application that new laws, and most especially new statutes, should be based upon notions and conceptions with which the people are familiar; they should reflect the customary and popular customs, habits of thought, and institutions.

§ 149. System of acequias impracticable.

If the foregoing general principles of legislation are accepted and followed, it is plain that the public system of "*acequias*" which prevails in New Mexico and Arizona would be utterly impracticable and impossible in California and Nevada. By that system, it will be remembered, there is not, and cannot be, any private property rights in natural streams and lakes. All such waters are public, free to the use of all occupants of land for the purpose of irrigation. No person can appropriate the water of a stream even for the purpose of milling. The irrigating canals or "*acequias*" are maintained by the public, at the public expense, and are controlled by the local authorities. It is enough to say of this system, which is borrowed from the Spanish-Mexican laws, that it is utterly foreign to the habits of thought, customs, modes of legislation, and institutions of our people; and its adoption would violate all of the established rights of private riparian proprietors as recognized by the existing law of the state. It is hardly probable that any one would seriously advocate the introduction of this type of legislation.

§ 150. Colorado system criticised.

It has, however, been strenuously urged that the Colorado system of defining and regulating water-rights, which virtually prevails in Montana, Idaho, and other territories, and of which a detailed account was given in a previous chapter, should be adopted by the legislation of California. We do not think that any intelligent lawyer or statesman, or careful student of political economy, who was familiar with the results of legislation, and with the enforcement of statutes creating hostile and conflicting interests, could recommend the adoption of this Colorado system. In order to understand what this legislation really is, the reader must consult the detailed synopsis of the statutes given in a former chapter; it will be sufficient now to state its essential and fundamental notions. It utterly disregards all natural laws and the natural rights arising from the *position* of those who own lands situated directly upon the banks of streams. It places persons owning land at any distance from a stream upon exactly the same footing of right to its water with those who own land upon its very banks. Its fundamental idea is that prior appropriation from any stream by any one, irrespective of his location, or his prior possession or ownership, confers an absolute supremacy of right to use and divert its water; so that a proprietor who has for years owned land on the banks of a stream, but has not constructed a ditch by which to divert and use its water, shall be subordinate to any person who makes a prior actual appropriation for the benefit of his lands, however distant from the stream. It virtually permits an unlimited invasion of private lands, for the purpose of constructing and maintaining ditches across them by which to carry water.

As Colorado and these territories become more fully settled, especially by an agricultural population, this system of water regulation will inevitably give rise to an enormous amount of

trouble, controversy, and litigation. It is impossible to conceive of legislation tending more than this to create strifes, conflicts, and breaches of the peace. The right of prior appropriation on the public streams was a most fruitful cause of litigation in California, as is shown by the great number of reported cases; but this is a feeble illustration of the litigation and controversy which must arise from the statutes of Colorado and of the various territories when they come into full operation upon an increasing population.

§ 151. Legislation must respect natural laws and natural rights.

No legislation can be just or practicable, or can tend to the peace and prosperity of society, which attempts to violate and override natural laws and natural rights,—the immutable truths which exist in the regular order of nature. No matter what may be its motive, although enacted for the assumed purpose of benefiting certain classes of society, legislation which disregards natural laws, justice, and rights not only produces evil to society as a whole, but even injures the very classes it was designed to benefit. There is much in the general legislation of California which demonstrates the truth of this principle. A most instructive essay might be written upon this topic, which would conclusively show the injurious results of many California statutes which violate natural laws, and economic truths and rights based upon natural *justice*,—results which bear most heavily upon the very classes whose interests were intended to be promoted. We cannot refrain from illustrating this most momentous principle of economic laws by a single example. The legislation of California, in dealing with the relations of debtor and creditor, leans very strongly in the supposed favor of the debtor class. This leaning is shown in a very remarkable manner in the statute of limitations. There is probably no

other civilized country in the world, except perhaps some states or territories which have copied the California statutes, which prescribes such extremely short periods of limitation within which rights of action are barred. Every lawyer of intelligence is familiar with the analogous statutes in England and in most of the American states, and can make the comparison with our own. These extremely short periods which seem to abridge the creditor's rights, were enacted with the supposition that the debtor class would be benefited thereby. What is the actual effect? There is no other state in the Union where the laws are *practically* so hard against debtors in the enforcement of claims as in California; there is no other state where the debtor's property is so constantly and necessarily sacrificed on judgments and executions.

Under these statutes of limitation, and the decisions construing them, a creditor, however well disposed and however willing to favor his debtor, cannot be lenient, cannot give terms. Any leniency on his part is simply rendered impossible by the statute which would bar and destroy his claim by a brief period of inaction. However worthy, honest, and industrious the debtor may be, or however unfortunate he may have been, his creditor cannot stay his hand except at the risk of entirely losing the demand. The creditor must foreclose his mortgage within the brief statutory period, no matter at how great a loss for the debtor; he must sue and obtain judgment, and must seize and sell the debtor's property on execution, no matter at how great a sacrifice. In other states a creditor can be lenient without risk to himself; he can wait for years, so that an honest, industrious, or unfortunate debtor may recover himself, because his mortgage remains good for twenty years, his judgment continues to be an effective security for ten years, and his debt, whatever may be its form, is not barred within six years. But the legislature of California, acting in the supposed interests of

the debtor class, has made it simply impossible for a creditor to be lenient, and has exposed the debtor to a greater risk of loss and sacrifice of property than results from the laws of any other state, except those, if any, which have copied the California statutes.

This is only a single example, but it well illustrates a principle which is universal. The truth is established, not only by the most convincing *a priori* reasoning, but by general experience, that legislation which disregards natural laws and rights must work injury to society. The various classes of society are so connected that no large class can be injured without injury to all.

§ 152. Natural rights and advantages of riparian owners.

The laws of nature certainly give a natural right and advantage, from their superiority of position, to those who own land lying on the banks of natural streams. It is an undeniable *fact* that such proprietors have a natural right as compared with those who own land at a distance from streams. Legislation which disregards this fact—which attempts to deprive the one class of their natural right and advantage, and to confer the same right and advantage upon the other—is necessarily impracticable; it cannot work successfully; it is essentially unjust, and can only produce wrong. Statutes, however elaborate and detailed, which invade natural rights, and violate the sense of natural justice, must be the occasion of unlimited confusion, strife, contention, and litigation; nothing can be settled and established by them. The common-law doctrines recognize and protect this natural right and advantage of the private riparian proprietor; they regard it as a fact which cannot be denied nor overcome, and they build all of their specific rules upon it as a foundation.

A similar natural advantage is connected with landed ownership in many other respects. Those who own fertile and productive lands have an enormous natural superiority over those proprietors whose lands are wholly situated in barren and unproductive soils and regions. Is this any just ground for legislation which would authorize the latter class to invade the possessions of the former, and to deprive them of some portion of their more valuable property? Those who own land upon which there is a supply of forest trees, have a great natural advantage over those whose lands are entirely devoid of timber. Is this any just ground for statutes enabling the latter to claim and appropriate a portion of the timber land belonging to the former? The use of the stream, and of the water flowing through it, forms a part of the rights incident to and involved in the ownership of the lands upon its borders. This is the principle recognized by the common law, and which should be recognized by any auxiliary legislation. It is, moreover, a natural law, an inevitable fact, which no legislation can change. Any statute denying this fact simply attempts an impossibility.

§ 153. Legislation should recognize these rights.

It results from the foregoing positions that any legislation, in order to be just and practicable, should *primarily* recognize, maintain, and protect the water-rights, and especially the right to use the water, for purposes of irrigation, of all the private riparian proprietors owning lands abutting on either bank of any natural stream throughout its entire course.

§ 154. Jurisdiction of equity.

We have no doubt that equity has full jurisdiction over all the private riparian proprietors upon any given stream, to determine their individual rights, and to furnish a perpetual means for the protection and enforcement of those rights. A very re-

markable case, which came within our personal knowledge several years ago, furnishes a most striking illustration of the *principle* which underlies this equitable jurisdiction.¹

In the early settlement of the city of Rochester, on the Genesee river, in western New York, a gentleman named Brown owned the bed of the Genesee river immediately above the main falls,—a perpendicular fall nearly one hundred feet high within the limits of the city,—and also a strip of land extending from these falls along the west bank of the river for a mile or more. He built a dam across the river a few rods above the falls, and constructed a mill race or canal leading from this dam about a mile down the river, on its west side, parallel to and a few hundred feet from the river bank, which was through this whole length a perpendicular cliff nearly one hundred feet high. One of the finest water-powers in the country was thus obtained and utilized. The space between this mill canal and the west bank of the river he divided into a large number of mill lots, perhaps one hundred in all, varying in width, each abutting at its front end on the mill canal, and at its rear end on the perpendicular bank of the river. These lots, together with the right to draw a certain amount of the water from the mill canal, were from time to time conveyed in fee to different grantees, each grantee covenanting to use only the amount of water specified in his deed of conveyance. In process of time, all the lots had thus been sold and conveyed in fee, and Brown, the original owner, retained no interest whatever in the property. A continuous line of mills and manufactories had been built on these lots along the bank of the river; many of the lots had passed to subsequent grantees; and there were perhaps one hundred dif-

¹The *principle* is the avoiding a multiplicity of suits by quieting the titles of numerous parties when they all depend upon the same rule

of law and the same questions of facts. See the discussion of this principle in 1 Pom. Eq. §§ 255-275.

ferent proprietors of mill lots, all holding under the original conveyances from Brown. There was, of course, no privity of contract between these various grantees and lot-owners, and since Brown had conveyed each lot in fee, and had retained no reversionary interest whatever, there was no privity of estate among the various grantees and proprietors of different mill lots. When the Genesee river was high, there was an ample supply of water for the needs of all the mills and manufactories. But during a large portion of each year, while the natural flow of the river was lessened, the supply of water through the mill canal was diminished; and in consequence of this the lot-owners on the upper part of the canal diverted and consumed more of the water than the proportionate amounts to which they were entitled. This practice of unlawful consumption was carried on to such an extent that the supply of water was largely cut off from the lots on the lower part of the canal, and a very serious loss was thereby occasioned to their owners. For all this injury there was no adequate remedy at law. In this condition the owner of a mill at the lower end of the canal brought a suit in equity, making all the other proprietors and occupants of mill lots bordering on the canal defendants, and setting out facts showing the titles and water-rights of each separate and individual lot, for the purpose of obtaining a decree establishing and quieting the title of each proprietor on the canal to divert and use the waters. Such a decree was rendered. It established the right of each proprietor to use the proportionate amount of water conveyed by his original deed; it definitely fixed these amounts; it determined the number of feet or inches of water which could be drawn from the canal for each lot, and the size of the opening through which the water could flow; and it provided for constructing permanent barriers and gates for each lot, by means of which the amount drawn from the canal for the use of the lot might be controlled and regulated. In order to make the de-

cision final and perpetual, and to secure and protect the rights of all thus determined, the decree provided for the appointment and maintenance of a perpetual commission, representing all the proprietors on the canal, who should possess the power to inspect the water supply-gates and openings of each lot, and to preserve inviolate the water-rights and water supply of each lot as they had thus been finally established by the decree of the court.¹

It is true the stream in this case was an artificial canal; but, as there was no privity of contract nor of estate among all the different lot-owners on the canal, their relations with each other, so far as the jurisdiction of equity is concerned, were virtually the same as those which subsist between the different private riparian proprietors upon any natural stream. The principle is the same in both cases. We have no doubt that on the same principle, in a suit brought by one private riparian proprietor against all the other similar proprietors upon any given stream, a court of equity might establish their rights as among themselves to use the water for irrigation, the amounts which each could divert, and the order, times, and seasons of his diversion, and might appoint a perpetual commission, representing all the proprietors on that stream, which should have power to carry into effect the provisions of the decree.

§ 155. Legislation to the same end.

Granting this to be within the jurisdiction of equity, yet the same end could be more easily, simply, and inexpensively accomplished by appropriate legislation. We have referred to the jurisdiction of equity, not for the purpose of advising a resort to it, but for the purpose of illustrating more plainly the

¹This case exemplifies in the clearest manner the practically unlimited power of courts of equity to adapt their special remedies to special and new conditions of fact.

exact object sought to be obtained by means of legislation. The legislation should regard all the private riparian proprietors owning lands abutting on either bank of any given natural stream as constituting one individual community for the purpose of irrigation. It should *primarily* assert, secure, and protect the equal rights of all the members of this community to use the waters of that stream for the purpose of irrigation, as rights naturally superior to those held by all other classes of land-owners. It should *declare*, in the clearest manner, the fundamental principle that each riparian proprietor is only entitled to use, for the irrigation of his own land, such portion of the stream as is the excess over and above the portions which all the other riparian proprietors upon the same stream are entitled to use, for the like purpose, on their own lands; and the equally fundamental principle that other persons owning land, *not* situated on the stream, are only entitled to use, for the irrigation of their *non-riparian* lands, such portion of the waters of the stream as remain in excess after the *primary* needs of the riparian proprietors have been *reasonably* satisfied. To protect and enforce the rights thus declared, the legislation should provide for a local officer or commissioner, or *small* board of commissioners, chosen in some manner by the community of riparian proprietors. It should be the duty of this commissioner or board to make and enforce specific rules or by-laws concerning the use of the water for irrigation by the individual members of the community of riparian proprietors, and also to determine the amount of the stream, if any, remaining over and above after the wants of the riparian proprietors had been reasonably supplied, and which could be appropriated, if required, to the irrigation of lands at a distance from the stream. Into the detail of these specific rules or by-laws which should be made by the local commissioners on each stream we shall not attempt to enter. They must necessarily vary with the size and character

of the streams, and should be adapted to all the possible conditions of fact. Such rules could easily be prepared by intelligent members of each riparian community, who were familiar with the stream, and with the modes of husbandry and wants of the whole community residing on its banks.

§ 156. Provision for non-riparian lands.

Thus far our proposed legislation has dealt alone with the rights of the actual riparian proprietor to use the waters of a stream for the irrigation of their riparian lands; and we are now brought to the much more difficult inquiry, how far and how should the legislation provide for the diversion of water from a stream for the purpose of irrigating lands not situated on its banks,—lands belonging to owners who are non-riparian, but which may need the aid of irrigation in order to develop their full capacity for production, or, perhaps, to render them at all productive? In many of the smaller streams throughout the state the natural flow of water is so limited and fluctuating that no diversion could be made to supply the wants of other land-owners without thereby infringing upon the superior rights of their riparian proprietors. This class of small streams must, it seems, be left for the exclusive use of those who possess the natural advantage of owning lands upon their banks. Unless this be so, then it should be carefully observed that there *is not any limit whatever*, depending upon the size of a natural stream, to the right of appropriation held by any third person; any third person would have the same right to interpose and appropriate the waters of a natural brook, which both rises and flows through its entire length within the boundaries of any land, which he has to appropriate the waters of a somewhat larger stream which runs for a few miles through or between the lands of several proprietors. This simple illustration shows the absurdity, as well as the in-

justice, of carrying the doctrine of appropriation to its logical results.

But the larger and permanent rivers of the state, the San Joaquin, and its affluents like the Merced, the Tuolumne, the Calaveras, and others coming down from the heights of the Sierras, and the Sacramento with its similar branches, the Bear, the Yuba, the Feather, and others, when not polluted by hydraulic mining, if reasonably and properly controlled and utilized, can certainly furnish an adequate and constant supply of water, for the purpose of irrigation, to vast communities of land-owners in addition to the riparian proprietors upon their very banks. And irrigation is a matter of such paramount importance to the agricultural interests of California that legislation should add something to the mere common-law doctrines, for the benefit of these non-riparian cultivators of the soil. The problem is, how shall the needs of these communities of land-owners away from the large streams—these *non-riparian* owners—be provided for and satisfied, consistently with the natural advantage and *primary* right of the communities of riparian proprietors? The doctrine of unlimited prior appropriation, which obtains on purely public streams, must, as we have seen, be rejected as both unjust and impracticable in its application to these private streams,—streams bordered by private ownership.

§ 157. Condemnation of stream for public use.

The question first arises whether, as a mode of solving this problem, the legislature should provide some general means by which any community or neighborhood of distant, non-riparian owners may appropriate and take the waters of a convenient stream, through the process of condemnation, under an exercise of the right of eminent domain, upon the payment of a just compensation to the private riparian proprietors on the banks of such stream whose property has been taken and whose pri-

mary rights have been invaded? This method of obtaining the water of a stream by distant land-owners is recognized by the California statute passed in 1874, quoted in a former chapter; but that statute is only local and partial in its application, and it lacks the detail and precision essential to a practical system.

Is the use of water by private land-owners for the irrigation of their lands a "*public use*," within the settled meaning of that term, so that the legislature has power, under the constitution, to authorize the taking of water for such purpose, by the right of eminent domain,—the power to take private property for a public use upon the payment of a just compensation? The fact that a statute declares a certain use to be a public one, and authorizes the taking of private property for it, does not necessarily make the use public, nor render the taking of private property for it valid. It is settled by unanimous agreement of authorities that, *when a use is public*, the decision of the legislature that the public needs require the taking of private property to promote the use is final and conclusive, and cannot be inquired into by the courts. But it is equally well settled by courts of the highest authority that the question whether *a given use is or is not public* is a judicial one, to be determined by the courts. If the mere declaration of the legislature that a certain use is public, and authorized the taking of private property, were final and conclusive, then the constitutional guaranty forbidding the taking of private property except for public use would be rendered wholly nugatory; it would be made a mere empty form of words. For example, if a statute of the state legislature should pronounce a certain manufactory carried on at a certain town to be a public use, and should purport to authorize its owners to take private property for their own purposes, the courts would not be impeded by this legislative declaration, but would hold the statute to be unconstitutional and void. The following points concerning the use of natural waters for various

purposes have been settled by the courts: The supply of water to the inhabitants of a city, village, or town, either by the municipal authorities themselves, as in case of the Croton Water-Works for New York city, or by a corporation, as in case of the Spring Valley Water Company for San Francisco, is clearly established to be a public use. The ground upon which this conclusion was rested is that a water supply to the members of a community is necessary to promote the general health of that community; and there is no higher or more evident public use than the public health. A supply of water for drinking, for washing and bathing, and for all other domestic purposes, and for flushing sewers, and the like, tends to promote the general public health of a city or village as much as a supply of pure air. To furnish an adequate supply for such purposes, the waters of a natural stream or lake may therefore be condemned upon payment of just compensation to those whose private property rights are thereby invaded.¹

Again, it is settled that the draining of extensive districts of swampy, marshy, or wet lands is a public use, and that private property may be taken for such drainage works, or to defray the expense of their construction and maintenance. This decision has been wholly placed, by the courts, upon the ground of the

¹[*St. Helena Water Co. v. Forbes*, 62 Cal. 182; *Smith v. Gould*, 59 Wis. 631, s. c. 18 N. W. Rep. 457. A city which has, under statutory authority, acquired riparian property by purchase or condemnation, and erected water-works for the purpose of supplying the inhabitants with water, is, like any other riparian proprietor, entitled to have upper proprietors enjoined from polluting the stream, unless they have acquired a right to do so by prescription, in which case

the city would have to acquire that prescriptive right as it did the other, by purchase or condemnation. *Baltimore v. Warren Manuf'g Co.*, 59 Md. 96. The construction and maintenance of a public canal is a public purpose; and water may be taken for that purpose, although the mill-power of adjacent riparian proprietors is thereby injured or destroyed, compensation being made. *Cooper v. Williams*, 4 Ohio, 253.]

benefit to the general health of the local community resulting from the drainage. The courts have most distinctly held, in passing upon this class of cases, that the benefit done to the individual owners, the enhancement in the value of their farms, the increase in the productions of their lands, and the like, resulting from the system of drainage, do not of themselves make such works a public use; such benefits are nothing but a private use more or less multiplied. The public health alone is what gives the character of a public use to such measures. Again, it is settled by an overwhelming weight of authority in a great majority of the states,—although a different rule prevails in a few states, the effect of local customs,—that the propelling of mills, factories, and manufactories, by water taken from natural streams, is in no sense a public use. It may be regarded, as the result of principle and authority, that anything which merely benefits an individual's own private property; which merely enhances its value, or renders it more productive or more capable of cultivation,—is not a public use. And what is thus essentially a private benefit does not become a "public use," simply because a large number of individuals may enjoy the same benefit with respect to their own private property. Otherwise, there is not a single trade, business, or profession that is not a "public use" within the provision of the constitution.

§ 158. Whether irrigation is a public use.

Is, therefore, the taking of water from natural streams for the irrigation of the lands of private owners a public use? If water should be thus taken by one person alone to irrigate his own farm, then, under the doctrines derived both from principle and from the authority of decided cases, the use would clearly seem to be private and not public,—as completely private as plowing, sowing, planting, fencing, ditching, and any other

means by which the land is improved, its value enhanced, or its productiveness increased for the personal and immediate benefit of the owner. The conclusion would seem to be equally true, if water is taken in like manner by several separate and detached owners, for the benefit of each individual's land. But suppose there is a community composed of numerous—say 50—different landed proprietors, occupying a certain well-defined tract of land, containing many thousand acres, situated at a distance of several miles from a large stream, and so located topographically that all the farms comprised in the tract could be irrigated by means of one main canal taking water from that stream.

This supposition presents the question in the most favorable light possible, and it certainly and fairly represents the actual condition, with respect to the needs and the facilities for irrigation, in many parts of the state. Would the irrigation of the lands belonging to the members of this community be a public use, so that they would be authorized, for that purpose, to appropriate and condemn the waters of the neighboring stream, against the consent of the private riparian proprietors on such stream? The question is a very difficult one; the answer to it is far from clear. How does the use of the water by each individual member of such community differ in kind or degree from the use of the water by each riparian proprietor on the stream? How does the use by the whole community differ from the use by the entire mass of riparian proprietors? How is the use by such community any more public than the use by all the riparian proprietors on the stream? By what justice, or under what principle of constitutional law, can such a community, *simply because it occupies a tract of land at a distance from the stream*, deprive the community living on the stream of their natural right to the water, *when the uses by each community are exactly the*

same? For it should be remembered that the right to appropriate and condemn the water of a stream by exercise of the right of eminent domain, if it exists at all, is absolutely unlimited as to extent and quantity. If the distant community may condemn any portion of the waters of a stream, against the consent of the riparian proprietors on the stream, then it may condemn and appropriate the entire body of the water, and leave none whatever for the riparian proprietors, upon the payment of sufficient compensation. Again, how should the compensation be assessed and paid in any such case of condemning partially or wholly the waters of a stream? Every riparian proprietor on the stream would be justly entitled to some compensation, for the rights of every one would be invaded. Any fair, reasonable, and just assessment of the damages among all the riparian proprietors would be practically impossible.

These are some of the difficulties which must necessarily attend any scheme for the condemnation of the waters of a natural stream, under the right of eminent domain, for the benefit of communities located at a distance from the stream.

Whatever measures of legislation are adopted, the natural rights of the riparian proprietors on the streams should, as we have already shown, be first protected and their exercise regulated. Only the *excess* of the water remaining unconsumed after *their* needs have been *reasonably* supplied should be appropriated to the use of distant and non-riparian owners. But in such a case there is no necessity for any resort to the right of eminent domain, to the condemnation of water, nor to the payment of compensation. Communities of owners at a distance from the larger streams should be entitled to reach and appropriate this excess of their waters after the wants of the riparian proprietors are reasonably satisfied, without any condemnation or payment of compensation, since such a use would not substantially affect any rights held by the riparian proprietors on the streams.

There is no right with the land as
land owners, riparian.

§ 159. Eminent domain.

[It seems very clear, upon the authorities, that riparian owners have a vested right in the benefits and advantages arising from their adjoining the water, of which they cannot be deprived without compensation.¹ But that, under proper conditions, a water-course may be taken under the power of eminent domain, for the irrigation of the surrounding country, seems to be plainly indicated by the decision in *Lux v. Haggin*,² that "the riparian owner's property in the water of a stream may (on payment of due compensation to him) be taken to supply farming neighborhoods with water." "It is apparent," said the court, "that in deciding whether a use was public the legislature was not limited by the mere *number* of persons to be immediately benefited, as opposed to those from whom property is to be taken. It must happen that a public use (as of a particular wagon or railroad) will rarely be directly enjoyed by all the denizens of the state, or of a county or city, and rarely that all within the smallest political subdivision can, as a fact, immediately enjoy every public use. Nor need the enjoyment of a public use be unconditional. A citizen of a municipality to which water has been brought by a person or corporation which, as agent of the government, has exercised the power of eminent domain, can demand water only on payment of the established rate, and on compliance with reasonable rules and regulations. And while the court will hold the use private where it appears that the government or public *cannot* have any interest in it, the legislature, in determining the expediency of declaring a use public, may, no doubt, properly take into the consideration all the advantages to follow from such action; as the advancement

¹ *Bell v. Gough*, 3 Zab. 624; *Trenton Water Co. v. Raff*, 36 N. J. Law, 335; *Munroe v. Ivie*, 2 Utah,

535. See *Commissioners of Homochitto River v. Withers*, 29 Miss. 21.

² 10 Pac. Rep. 697, construing Code Civil Proc. Cal. 1238.

of agriculture, the encouragement of mining and the arts, and the general, though indirect, benefits derived to the people at large from the dedication. * * * The words 'farming neighborhoods' are somewhat indefinite. The idea sought to be conveyed by them is more readily conceived than put into accurate language. Of course, 'farming neighborhood' implies more than one farm; but it would be difficult to say that any certain number is essential to constitute such a neighborhood. The vicinage may be nearer or more distant, reference being had to the populousness or sparseness of population of the surrounding country; but the farmers must be so near to each other—relatively to the surrounding settlers—as to make what in popular parlance is known as a 'farming neighborhood.' A very exact definition of the word is not, however, of paramount importance. The main purpose of the statutes is to provide a mode by which the state, or its agent, may conduct water to arable lands where irrigation is a necessity, on payment of due compensation to those from whom the water is diverted. The same agent of the state may take water to more than one farming neighborhood. It must always be borne in mind that under the Codes no man, or set of men, can take another's property for his own *exclusive* use. Whoever attempts to condemn the private right must be prepared to furnish (to the extent of the water he consumes and pays for) every individual of the community or communities, farming neighborhood, or farming neighborhoods, to which he conducts it, the consumers being required to pay reasonable rates, and being subjected to reasonable regulations; and whether the quantity sought to be condemned is reasonably necessary to supply the public use in a neighborhood or neighborhoods must be determined by the court in which the proceedings are brought for condemnation of the private right."¹]

¹ *Lux v. Haggin*, (Cal.) 10 Pac. Rep. 700.

§ 160. Summary of suggestions concerning legislation.

Without any further discussion, we shall briefly sum up our conclusions with respect to the character, form, and objects of the legislation which we suggest:

First. The resort to the right of eminent domain and the condemnation of water should be restricted mainly, even if not entirely, to the obtaining adequate supplies for consumption by cities, villages, and other municipalities. This being a public use of the highest nature,—the preservation of the general health,—it overrides all other uses, and takes preference of irrigation, manufacturing, mining, watering stock, and all other ordinary purposes to which natural streams may be appropriated. All other uses of water must succumb to this.

Second. The smaller streams throughout the state should be left substantially to the exclusive use, so far as irrigation is concerned, of the private riparian proprietors upon their banks. The natural right and advantage of the riparian proprietors entitle them to the first use of the waters of such streams; and, after their primary needs have been reasonably satisfied, there will not be left any substantial excess of the waters for the use of distant and non-riparian land-owners.

Third. The larger and permanent streams throughout the state, the names of some of which have already been mentioned, are capable, when properly regulated and utilized, of supplying the needs for irrigation, not only of all the private riparian proprietors on their banks, but also of large communities who occupy lands more or less distant from them. While the riparian proprietors even on these larger streams have a natural advantage, and are entitled to have their wants first supplied for purposes of irrigation, yet they are not entitled to consume the entire waters of a stream. After the reasonable needs of the ri-

parian proprietors have been fairly and reasonably ascertained and satisfied, all the excess of the waters of any such stream belongs of right, for the purposes of irrigation, to those communities of non-riparian land-owners who are so situated, geographically and topographically, that they can in the best manner appropriate and utilize such surplus of the waters.

Fourth. Legislation of the character heretofore described should carry these principles into operation. A single commissioner, representing the community of riparian proprietors on each of the smaller streams, could regulate their use of the water for irrigation by appropriate by-laws. On each of the larger class of streams a local board of commissioners could frame the necessary by-laws for the government of both the riparian proprietors on the stream, and the communities of land-owners occupying tracts at a distance from it. The general powers of these commissioners, and the general nature of the rules or by-laws which they should promulgate, have already been sufficiently indicated. The details of these special rules must largely depend upon particular circumstances connected with each separate stream.

Fifth. The title of the Civil Code concerning water-rights should be wholly repealed, as being entirely inconsistent with the fundamental principles of the system here proposed. The doctrine of prior appropriation is completely at war with a system which recognizes, harmonizes, and protects the rights of *all* parties in the state.

§ 161. Concluding observations.

I have now completed the design which was formed when this essay concerning "Water-Rights" was commenced; in fact, the discussion has extended to a much greater length than I had originally supposed would be necessary. It is true, I have by no means exhausted the general subject of rights connected

with water, of property in water, or in the soil covered by the water, under all conditions and circumstances. There are many important questions which I have left untouched; there are many questions of great doubt and difficulty, peculiar to this Pacific coast, to which I have not even alluded.

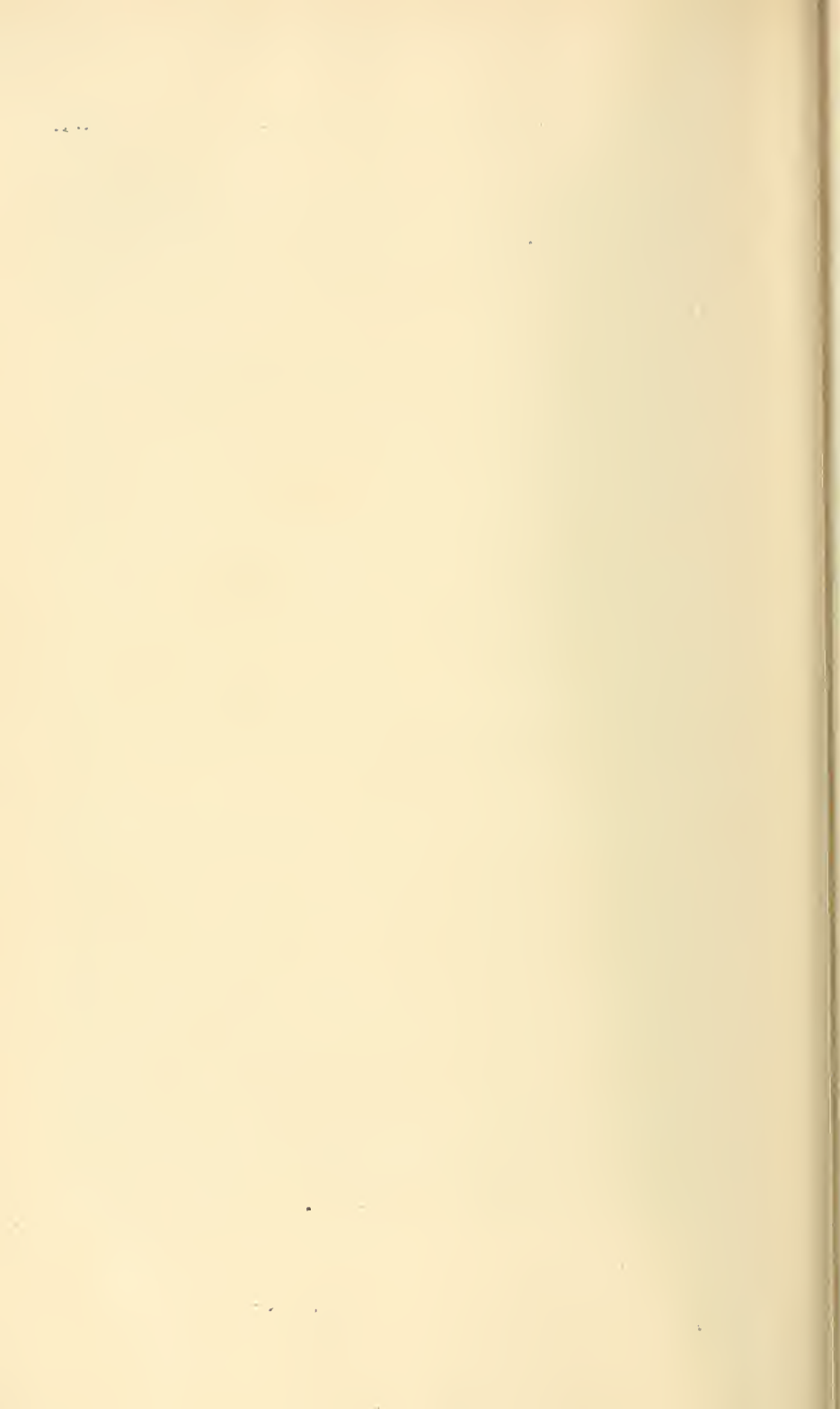
The single object of this essay was to ascertain, as far as possible, the law peculiar to the Pacific states and territories, concerning the waters of natural running streams, the rights of all persons, riparian proprietors and others, to use the waters of such streams, and especially, as being of paramount importance to the agricultural interests, their right to use and consume these waters for the purpose of irrigation.

Upon the foundation of existing law, as thus ascertained, it was my further design to suggest such measures of just and practicable legislation as would render the waters of these streams available, for purposes of irrigation, to the largest communities of persons engaged in agriculture, with the least possible interference with the existing and natural rights of any class. The object thus proposed has been reasonably accomplished. There seemed to be a prevailing opinion among the members of the legal profession—an opinion in which I partook when commencing this essay—that the law of California and other Pacific commonwealths concerning the water-rights in natural streams, private riparian rights, the rights of private riparian proprietors, and similar topics connected with the appropriation and use of such waters, was wholly vague, unsettled, and uncertain, to be collected only from doubtful, contradictory, and conflicting decisions. It has been shown that there is, in reality, no foundation for this opinion. In the great majority of the states and territories embraced within our review, the entire field has been occupied by elaborate systems of statutory legislation. In California and Nevada it has been shown, as it seems to me, beyond the possibility of question or doubt, that the principles

and fundamental doctrines of the common law concerning the waters of natural streams flowing through or by private lands, private riparian rights, and the rights of private riparian proprietors, have been established by the courts in an unbroken series of decisions.

There are two antagonistic interests in the state, each endeavoring to control the legislature, and to shape the legislation entirely in its own behalf, to the complete exclusion of the other. These are the riparian proprietors, who assert their common-law rights, and would exclude all other classes from any participation in the waters of the stream, however abundant; and the communities of land-owners away from the banks of streams, who deny any rights of the riparian proprietors, and claim a free, unrestricted access to and appropriation of all natural streams, limited only by the extent of their own needs. The latter class, being the most numerous, has prevailed with the legislature, and shaped the legislation exclusively for its own benefit, in most of the Pacific states and territories, whose statutes I have hereinbefore quoted.

The type of legislation which I have proposed, recognizes the just claims of both these classes; it provides for satisfying the demands of each, so far as possible, without completely sacrificing the other; but it necessarily requires that each should surrender some portion of its exclusive pretensions. I have the utmost confidence that the main elements and features of legislation which I have proposed, might, in the hands of intelligent men, who were familiar alike with the situation and topography of the larger rivers, and of the regions through which they run, and with the agricultural methods, customs, and wants of the adjacent communities, be worked up into a just, practicable, and efficient system for the regulation of irrigation throughout all parts of the state.



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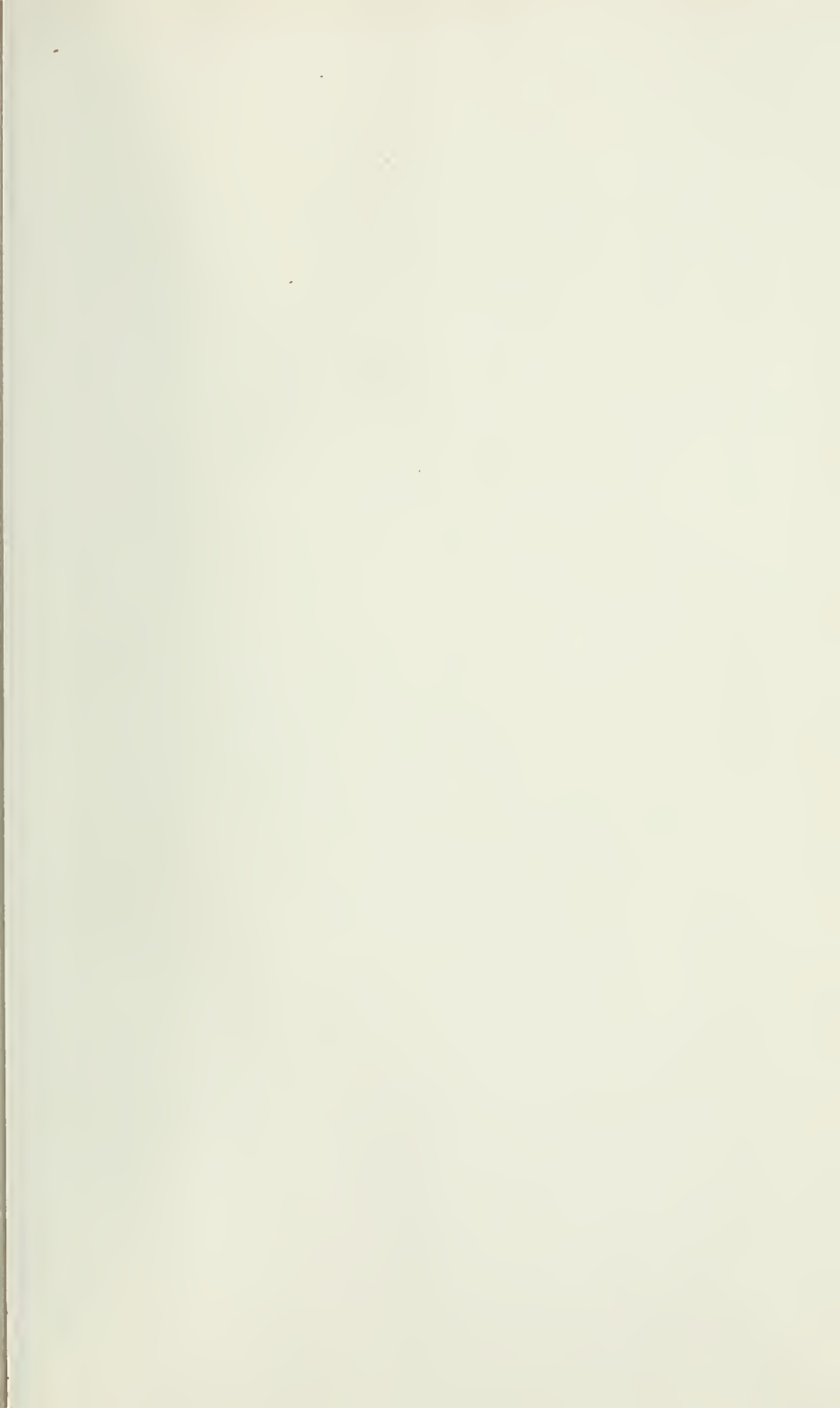
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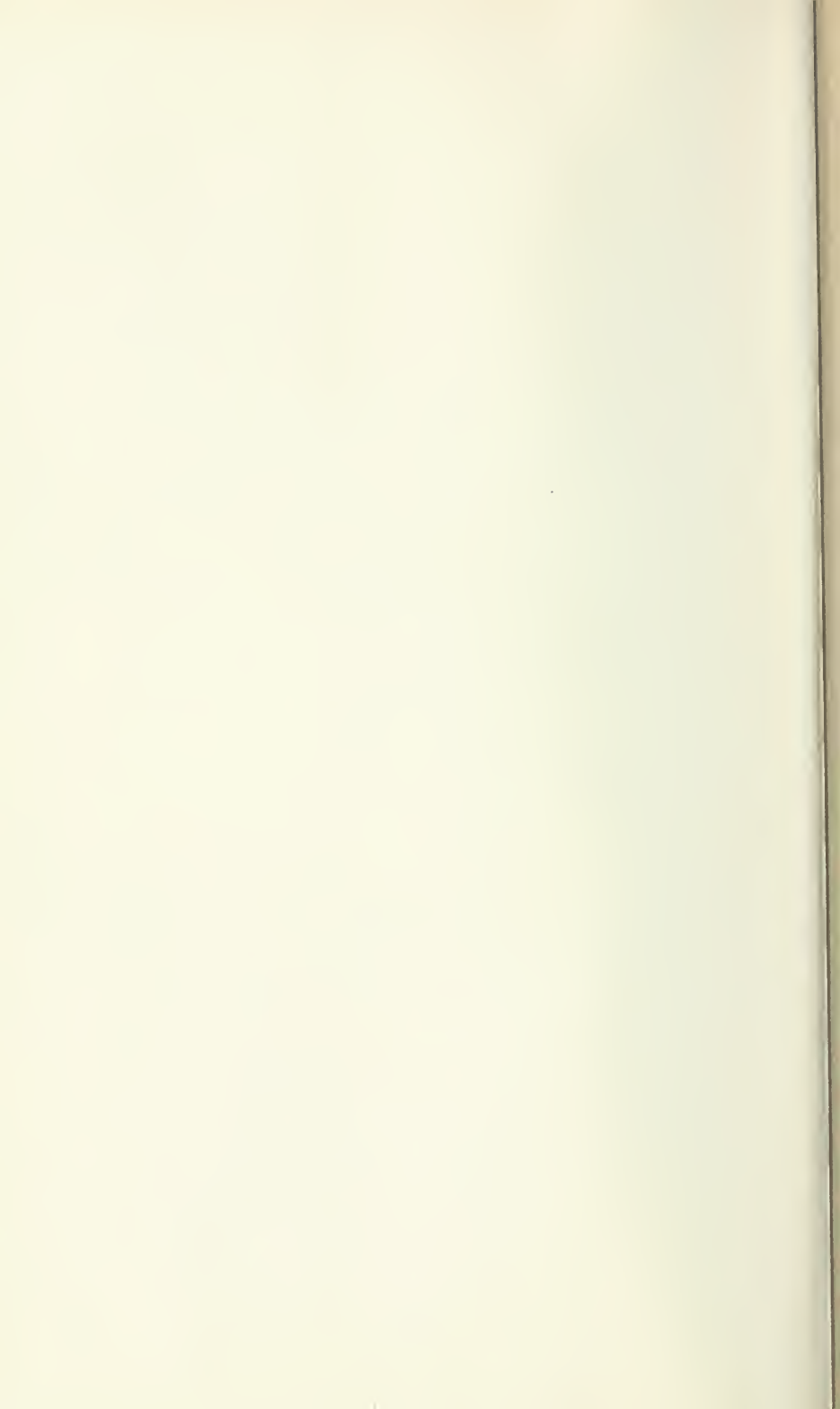
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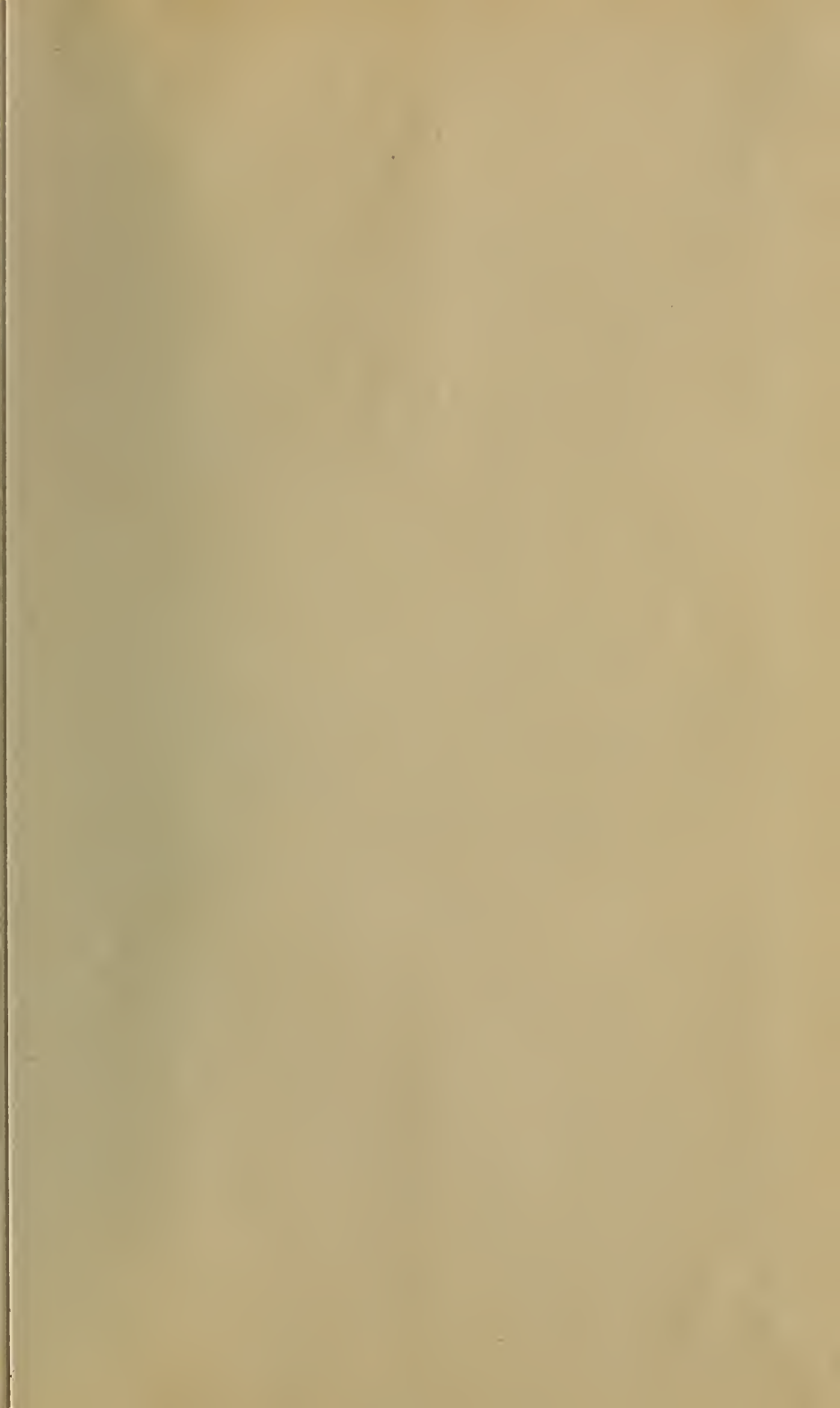
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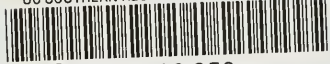
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